

DEPARTMENT OF LABOR'S ENFORCEMENT OF
ERISA

HEARING
BEFORE THE
SUBCOMMITTEE ON LABOR
OF THE
COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE
ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

EXAMINING THE DEPARTMENT OF LABOR'S ENFORCEMENT OF THE
EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, FOCUSING
ON PENSION SECURITY

MARCH 6, 1990

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DEPARTMENT OF LABOR'S ENFORCEMENT OF ERISA

TUESDAY, MARCH 6, 1990

U.S. SENATE,
SUBCOMMITTEE ON LABOR
OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC

The subcommittee met, pursuant to notice, at 8:37 a.m., in room SD-430, Dirksen Senate Office Building, Senator Howard M. Metzenbaum (chairman of the subcommittee) presiding.

Present: Senator Metzenbaum.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. We'll come to order.

Today the subcommittee will consider whether the rights guaranteed to workers by the Employee Retirement Income Security Act, commonly known as ERISA, are being adequately enforced by the Department of Labor.

During the past year, the Department's own Inspector General has issued two reports extremely critical of the Department's protection of workers' retirement benefits. The Inspector General went so far as to State that if the Department does not begin to enforce ERISA, this country could find itself faced with another savings and loan crisis. I share that concern.

There could hardly be a more critical issue. Without adequate enforcement, ERISA is little more than a hollow promise, a cruel hoax for tens of millions of Americans.

The heart of ERISA is its commitment to protect the pensions and welfare benefits earned by workers. We stand today at a crossroads. Millions of Americans depend on the stability of the pension system for their retirement. Millions more expect pensions to be there for them in the future. But danger signals have surfaced.

When ERISA was enacted in 1974, pensions were just starting to become important to workers. Many World War II veterans were applying for their promised retirement benefits only to find out that their pension funds were empty. The bitter tales of these hard-working Americans gave Congress the impetus to act. ERISA set minimum standards to protect workers' pension funds, including reporting and disclosure, participation and vesting, minimum funding, and fiduciary responsibility requirements.

ERISA set up a dual enforcement scheme. The Department of Labor was given broad power to protect workers' benefits. In addi-

tion, workers were provided the right to sue in Federal court to protect their rights.

The rights accorded to workers under ERISA are meaningless unless they can be enforced either by the Department of Labor or by participants themselves through private lawsuits. The adequacy of ERISA's enforcement scheme has been of concern almost since the enactment of ERISA.

I am glad to see the interest this issue has received during the past year, due in large part to the warnings of the Department's Inspector General. But I want to remind newcomers to this issue that ERISA enforcement has been criticized for close to 15 years.

Under each new administration, the Department of Labor has highlighted the weaknesses of its own program and then made minimal changes. But the real problems continue. They will not be solved by empty promises, by establishing a commission or a task force, or by timid changes in various enforcement procedures.

A number of congressional committees, as well as the GAO, have long been documenting the problems with the Department of Labor's enforcement of ERISA. Some of the problem is due to the Department's lack of resources. But that is not the heart of it. No agency has enough resources. We hear that complaint often. But its enforcement can still provide significant deterrence if properly targeted.

The risk to workers and the government for inadequate enforcement continues to grow. More workers and their families depend on employee benefits than ever before. Back in 1974, less than five million workers were receiving retirement benefits. Today, 10 million workers are currently receiving benefits, and another 60 million workers expect to receive benefits in the near future. Fifteen years ago, pension plans contained \$300 billion. Today they contain \$1.7 trillion—almost one-third of our country's investment capital.

The Pension Benefit Guaranty Corporation is on the hook for \$750 billion of employers' pension promises. But the Pension Benefit Guaranty Corporation isn't that financially sound itself. It brings back to mind FSLIC, the Federal Savings and Loan Insurance Corporation, which was guaranteeing the savings and loan accounts, but when it was time to put up the money, it wasn't there, so the American people were called upon to the extent of something approaching \$300 billion to bail out the savings and loan industry to save the depositors.

The PBGC, at the end of fiscal year 1989, had assets of \$3.2 billion. It had liabilities of \$4.2 billion. But that does not include the potential liability in connection with the LTV case which is pending in the Supreme Court at the present moment. And it does not include certain other major possible pension claims that could run those liabilities even higher.

So we have to concern ourselves, as the Inspector General has stated, that this fund could be in trouble. And if it becomes in trouble, the claim upon the PBGC could exceed even the amounts that the American people were called upon to put up to bail out the savings and loan institutions.

It is crucial, therefore, that the protections promised the workers by ERISA are meaningful. The Department of Labor has a responsibility to act to protect workers' benefits. I am tired of hearing

that the Department of Labor won't sue anyone, either because they don't have the money or the gumption. I am tired of getting thousands of letters each year from individuals around the country who have pension problems and cannot get help.

Recently, the Department of Labor has stated publicly that private enforcement of ERISA should be strengthened. In effect, the Secretary has thrown up her hands and said she cannot do the job. I do not accept that, nor do I accept the fact that we are supposed to turn to the private attorneys who will then come in for very large fees—and right now, they have problems getting fees, but if they were to get the fees there would be a big hullabaloo about wasting all that money for private attorneys. The Department of Labor has a job to do. It is not enough to just keep talking about it and saying we're going to get at it, we're going to get at it.

It is absurd for the Department of Labor to say that they cannot protect workers' pensions. That is what ERISA is all about. Secretary of Labor Dole has agreed to review the Department's enforcement of ERISA. Her 1991 budget request takes a first step by adding approximately 100 new people for ERISA enforcement, bringing the Department's total to 300. But the Department must do more. The Department must act.

The Department has to be more aggressive and go after the most egregious cases. The Department of Labor has promised to make recommendations to strengthen ERISA in the next few weeks. For 15 years, the Department has promised to enforce ERISA, and each time they did so, they promised to do something "tomorrow". The time to enforce ERISA is long overdue.

If the Department of Labor does not act to protect workers' pensions and benefits in the coming weeks, then Congress must step in and act for them.

I can only say that this is a disaster waiting to happen, and I therefore think it is very important that we hear from the man who first addressed himself to this subject publicly and did a fine job, Mr. Raymond Maria.

I would like to welcome you to the subcommittee and applaud you, sir, for your efforts over the past year to improve the Department of Labor's enforcement of ERISA. Unfortunately, as is the case with most whistleblowers, there are a lot of people who would like to silence you for speaking out so forcefully, so effectively.

I am deeply troubled about the rumors I am hearing that you may be forced out. I cannot believe that the President of the United States is a party to such efforts. I cannot believe that the President of the United States realizes and recognizes that you, who have spoken up and pointed out the problems, done it in a very forceful manner, done your homework, alerted the American people to the problem, are now being asked to step aside for the appointment of some new Inspector General. I do not share that view. And I know that I speak for a number of my colleagues who do not share it as well.

The President has always sought to encourage individual efforts to improve the Federal Government. I hope the rumors I am hearing about your being replaced are not true. You have courage, and you have brains, and unless I learn something presently that I do not know, you should have the Department of Labor position of In-

spector General, and I hope that you remain there to continue doing the courageous work that you have been doing. You should have the administration cheering for you, not seeking to remove you from your job.

Mr. Maria, I don't often compliment our witnesses before they speak. We are glad to have you with us. I think you are an able public servant, sir.

Please proceed with your statement.

STATEMENT OF RAYMOND MARIA, ACTING INSPECTOR GENERAL, U.S. DEPARTMENT OF LABOR, WASHINGTON, DC, ACCOMPANIED BY GERALD PETERSON, ASSISTANT INSPECTOR GENERAL, OFFICE OF AUDIT

Mr. MARIA. Thank you, Mr. Chairman.

I and my staff deeply appreciate your very generous remarks.

I am accompanied this morning by Gerald Peterson, Assistant Inspector General for the Office of Audit, who is intimately acquainted with the issues that we will be discussing here this morning.

Mr. Chairman, I have a prepared statement which I would like to submit for the record and will then summarize the statement.

Senator METZENBAUM. Because we are under the constraints of time, all witnesses will be held to a five-minute rule, and all written statements will be included in the record.

Please proceed.

Mr. MARIA. Mr. Chairman, I am pleased to appear before you this morning to discuss the Department of Labor's enforcement of the Employee Retirement Income Security Act and the related Title XVIII provisions of the United States Criminal Code.

Our basic position at the Office of Inspector General with the respect to the enforcement of ERISA has been distorted by the Department of Labor itself, by industry representatives, and by others. Hopefully, in the next few moments I will have an opportunity to reiterate our position and set the record straight.

The Office of Inspector General, based upon its audit and investigative work, does not, with the exception of small employer group health plans, believe that fraud and abuse are rampant in employee benefit plans and that participants and beneficiaries should live in fear. But the Inspector General has stated that these plans are increasingly vulnerable to fraud and abuse, and that steps need to be taken to address and diminish this vulnerability.

In your letter inviting me to speak this morning, you State that you are particularly interested in understanding the statutory and regulatory weaknesses in ERISA. Some of the weaknesses have been studied and addressed by the Inspector General's Office of Audit, which has concentrated on the role of the Independent Public Accountant. Additionally, there exists a serious policy weakness in the Department of Labor regarding the proper role of criminal enforcement.

First, with respect to the Independent Public Accountants, ERISA, which was enacted to provide protection and security for American workers, requires annual audits by Independent Public Accountants for plans with more than 100 participants. Since 1984, the Inspector General has performed extensive audit work regard-

ing the quality and use of Independent Public Accountant reports. We have consistently found that the IPA audit work is inadequate in scope and substandard in quality, and that the Pension Welfare Benefits Administration has not conceptualized how to use the Independent Public Accountant as part of the overall enforcement process.

Specifically, our findings are: current "limited scope" audits do not adequately test transactions or plan assets; the American Institute of Certified Public Accountants', AICPA's, Industry Audit Guide for Audits of Employee Benefit Plans, originally published in February 1983, has become seriously obsolete; IPA audits do not consistently meet professional standards, and PWBA is not enforcing existing ERISA requirements that these standards be met; and IPA audits are not disclosing information to plan participants or rendering opinions on information accompanying the plan's financial statement, as required by ERISA.

Recently, the Office of Inspector General and the Pension Welfare Benefits Administration sent a joint letter to the American Institute of CPA's expressing our concerns regarding the obsolete nature of the industry audit guide. Our initial assessment of the AICPA's response—the response to our suggested procedures, procedures to be incorporated in a new audit guide to make the audit process meaningful and realistic and to be able to integrate it into the overall enforcement process—the AICPA's response from our standpoint is they are hedging on full incorporation of their own public standards into the revised benefit guide.

Unfortunately, today the American Institute of CPA's states that it does not believe it is necessary to determine whether a plan's assets have been managed in accordance with the provisions of ERISA in order to render an opinion on the fairness of the plan's financial statements. We vehemently disagree with this position.

With respect to the PWBA's flawed enforcement strategy, we believe that PWBA's continued reliance on civil and administrative remedies and its minimal use of criminal remedies will not deter significant corruption and abuse. Civil restitution and penalties are a cost of doing business and a way of doing business for unscrupulous people in the benefit plan arena.

The criminal sanctions of imprisonment, forfeiture of assets, and disqualification must be judiciously factored into the Department's overall enforcement equation if indeed we are to have a credible deterrent.

Since 1978, the Inspector General's Office of Labor Racketeering has conducted investigations of fraud and corruption primarily in the area of union-affiliated plans, Taft-Hartley plans. In doing so, we have concluded—and we have graphic evidence to this effect—that kickbacks and financial extortion are not acts which are restricted to union-affiliated plans. The Teamsters and the Laborers do not have a monopoly on this type of corruption. This type of corruption exists today in governmental plans and in single-employer plans with no union involvement at all.

In prepared statements in prior hearings and in today's hearing, the Assistant Secretary for the Pension Welfare Benefits Administration will refer to the soundness of the Nation's pension system. Conspicuous by its absence are the words "welfare system," refer-

ring to medical plans, dental plans, optical plans, legal plans, and insurance plans. These plans are equally vital to participants—not just pension plans but welfare plans as well.

We need an opportunity to address serious fraud and abuse through criminal remedies. I'm not talking about people whose violations are technical in nature or accidental. I am talking about purposeful, wanton, malicious acts which occur as we speak in the benefit plan arena, both pension plans and welfare plans; these abuses unfortunately are more commonly found in welfare plans.

We have had a demonstrated record of success in pursuing these malicious acts of corruption by professional racketeers—again, people whose acts are not accidental, people whose livelihood is generated by manipulating benefit plans.

Our Office of Investigations was deployed in 1987 to pursue precisely this area. It achieved some 12 convictions in a very short period of time—amounts involving \$9 million from a pension plan, amounts involving \$700,000, \$500,000, \$200,000 with respect to welfare plan abuse. It is sad testimony that rather than applaud these accomplishments, the Department was outraged that the Inspector General appeared to be treading into an area that the Pension Welfare Benefits Administration believed it had an exclusive monopoly on.

Senator METZENBAUM. Did the Department of Labor ever bring any of those actions themselves?

Mr. MARIA. No. These were actions which stemmed from criminal investigations initiated by the Office of Inspector General's Office of Investigations, referred to the Department of Justice for prosecution, and indeed prosecution did result.

Senator METZENBAUM. And the Department of Labor did not support you, but rather, kind of indicated their concern that you were interfering with their job.

Mr. MARIA. Well, not only indicated their concern; the Department of Labor elicited from the Department of Justice an opinion which essentially precluded the Office of Investigations—not the Office of Labor Racketeering, but the Office of Investigations—from pursuing criminal violations dealing with employee benefit plan abuse and corruption.

In effect, this decision, which was I think certainly not in the interest of good government, certainly not in the interest of plan participants, has precluded the Inspector General from taking an additional 100 special agents in his Office of Investigations and using them to augment the 100 special agents, trained Federal criminal investigators, to pursue benefit plan corruption and abuse.

Senator METZENBAUM. When did the Department of Labor take that position?

Mr. MARIA. The Department of Labor in 1988 applied for, sought, that opinion; it arrived at that opinion in late 1988, sought an endorsement from the Department of Justice, and that opinion was issued from the Office of Legal Counsel in the Department of Justice in March of 1989.

In my professional opinion, that opinion was written in a vacuum and does not reflect the real world as it exists.

We now have 100 special agents, Federally-trained criminal investigators, who are precluded from applying their skills—skills at

electronic surveillance, development informants, and execution of search and seizure techniques—against professional criminals in the benefit plan arena. Today they are precluded from doing it within the context of not just vulnerability of pension plans, but today and in the 1990s, I submit we are in the midst of what I would call a health care crisis. Insurance companies today do not insure the full spectrum of lives—only that portion least likely to have claims. They have concluded that the small employer, the company with fewer than 100 employees, is a risk that they will not write. Today, group health insurance from legitimate carriers is largely unavailable. This has given rise to a proliferation of fraudulent, multiple-employer welfare arrangements which masquerade as self-funded trusts but, all too frequently, are nothing more than schemes, schemes to defraud.

It is estimated there are somewhere between 31 and 37 million Americans today without health insurance. I submit the number is too low.

In a recent conference with representatives from State attorney generals' offices, as well as State insurance commissioners' offices, on very short notice—we held a conference in an effort to determine the scope of this problem and the degree of fraud that exists—on very short notice, 34 States sent multiple representatives to our seminar and, as a result of that, we have some two dozen criminal investigations being conducted by our Office of Labor Racketeering today involving fraudulent schemes in which premiums of \$1 million, \$2 million and \$3 million a month are being collected, and indeed there is no hope on the part of participants of ever receiving legitimate health care coverage.

Again, we are in the midst of a crisis, and we are asked to do more with less in a diminishing budget environment. We have 100 people who are trained, who have a demonstrated record of accomplishment. Good judgment and good government I believe dictates that they be allowed to apply their skills against this very serious criminal problem.

In that regard, I would ask that the Congress of the United States expeditiously address the issue of the investigative jurisdiction of the Inspector General and permit him to use his resources against egregious criminal problems. I think that is good government.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Maria follows:]

STATEMENT OF RAYMOND MARIA
ACTING INSPECTOR GENERAL
U.S. DEPARTMENT OF LABOR
BEFORE THE SUBCOMMITTEE ON LABOR
OF THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
MARCH 6, 1990

Mr. Chairman and Members of the Subcommittee,

I am pleased to appear before you this morning to discuss the Department of Labor's enforcement of the Employee Retirement Income Security Act of 1974 (ERISA). This is the sixth time that I have testified before Congress concerning this subject since August, 1989 and in all honesty there is little for me to add to my previous statements. However, I firmly believe that the findings and recommendations of the Office of Inspector General concerning ERISA enforcement are relevant, timely, and supported by fact, and are neither "alarmist" in nature, designed to embarrass DOL, nor designed merely to generate publicity for OIG and/or myself.

OIG's basic position with respect to ERISA enforcement has been distorted by the Department of Labor, by industry representatives, and by others, and therefore I will reiterate our position and attempt to set the record straight: The Office of Inspector General, based upon its audit and investigative work, does not believe that fraud and abuse is rampant in employee benefit plans and that beneficiaries should live in fear, but OIG does believe that these plans are increasingly

vulnerable to fraud, abuse, and corruption, and steps need to be taken to address and diminish this vulnerability.

Mr. Chairman, in your letter inviting me to appear this morning, you state that you are particularly interested in understanding the statutory and regulatory weaknesses in ERISA. Some of these weaknesses have been studied and addressed by OIG's Office of Audit, which has concentrated on the role of Independent Public Accountants. In addition, a serious policy weakness exists in the Department of Labor regarding the proper role of criminal enforcement. These areas are addressed in my written statement, and I would be glad at this time to summarize my statement, or place it in the hearing record and proceed with questions from the Subcommittee.

The Role of Independent Public Accountants

ERISA, which was enacted to provide protection and security for American workers, requires annual audits by Independent Public Accountants (IPAs) for all employee benefit plans with more than 100 participants. ERISA's protections for plan participants depend heavily upon a thorough and responsible job by the IPAs in examining plan transactions and attesting to the validity of plan financial statements.

Since 1984, OIG has performed extensive audit work regarding the quality and use of IPA audit reports. We have consistently found that IPA audit work is inadequate in scope and substandard in quality, and that PWBA has not used the IPA resource effectively. Specifically, we have found:

-- Current "limited scope" audits do not adequately test transactions or plan assets. ERISA allows a plan administrator to omit from audit review any assets held in trust in a government-regulated industry such as a bank or savings and loan institution. However, OIG audit work has disclosed that audits of these government-regulated institutions are sporadic at best, precluding a continuous verification of plan assets or continuous assurance that these assets are being managed in compliance with ERISA.

-- The American Institute of Certified Public Accountants' (AICPA) Industry Audit Guide for Audits of Employee Benefit Plans, originally published in February 1983, has become seriously obsolete. Although the accounting profession has recently sought to close the gap between what clients and the public expect from audits and what the profession delivers, the AICPA has yet to integrate their many new Statements on Auditing Standards (SASs) into the AICPA audit guide for the benefit plan industry.

-- IPA audits do not consistently meet professional standards and PWBA is not enforcing existing ERISA requirements that these standards be met. For example, required schedules of matters such as transactions with parties-in-interest, assets held for investment, and reportable transactions are often not included in IPA reports. Consequently, plan participants are not receiving the information or protections of full disclosure as Congress intended.

-- IPA audits are not disclosing information to plan participants or rendering opinions on information accompanying a plan's financial statement as required by ERISA. Under current IPA reporting procedures, neither the Department nor the participants are directly informed of potential ERISA violations. IPAs consider plan sponsors or administrators to be their clients, and their reports are addressed to these parties.

The need to improve both the quality of IPA audits as well as their subsequent use is clear. The AICPA and the Department of Labor support our recommendation for the elimination of the ERISA provision allowing limited scope audits, and I would note that legislation has been introduced in the Senate (S. 2012) which would accomplish this objective.

In addition, both the AICPA and the Department have recognized the need to revise the current Industry Audit Guide for Audits of Employee Benefit Plans, and progress has been made in this revision process. However, the AICPA needs to specifically address the issue of holding IPAs who audit benefit plans to the same general standards recently promulgated for the accounting profession as a whole. These new AICPA standards address "The Auditor's Responsibility to Detect and Report Errors

and Irregularities" (SAS 53), "Illegal Acts by Clients" (SAS 54), and "Consideration of the Internal Control Structure in a Financial Statement Audit" (SAS 55).

The failure to incorporate these very important standards in the revised benefit plan audit guide will open a window of opportunity for IPAs, allowing them to sidestep, in the interests of time and economy, these very important responsibilities which have been embraced by the accounting profession in its effort to close the existing "expectation gap."

OIG and PWBA sent a joint letter to the AICPA expressing our concerns regarding this issue. Our initial assessment of the AICPA's response is that they are hedging on the full incorporation of their own published standards in the revised benefit audit guide. The AICPA states that additional guidance on auditor responsibilities under these new standards, consistent with the Employee Benefit Plan Committee's interpretation of these standards, will be added to the audit guide. In addition, the AICPA states that the Committee does not believe it necessary to determine whether a plan's assets have been managed in accordance with the provisions of ERISA in order to render an opinion on the fairness of the plan's financial statements.

OIG disagrees with the position taken by the AICPA. A reasonable effort must be made to identify errors,

irregularities, and acts which violate ERISA in order to render a responsible opinion on the fairness of the financial statements of the plan. Further, if the industry audit guide is properly revised, and the new standards fully incorporated, future audits will provide the levels of protection and disclosure to plan participants that Congress intended when it provided for independent plan audits.

With regard to substandard IPA audit work, OIG would like to see PWBA use its existing authority against plan administrators to obtain corrective action on IPA work that fails to meet these standards. We have asked PWBA to expand its quality review procedures to include evaluations of IPA audit work and have recommended that PWBA work with the AICPA to obtain specific monitoring coverage of ERISA audits in peer reviews.

With regard to proper disclosure, Congress and/or PWBA should require direct reporting by IPAs of potential and actual ERISA violations to senior plan management, the board of directors or its audit committee, and PWBA.

PWBA's Flawed Enforcement Strategy

PWBA's continued undue reliance on civil and administrative remedies and its minimal use of criminal remedies will not deter significant benefit plan fraud and abuse. Civil restitution and penalties are a cost of doing business and a way of business for

unscrupulous benefit plan operators, administrators, service providers, and others. The criminal sanctions of imprisonment, forfeiture of assets, and disqualification must be judiciously factored into the overall enforcement equation in order to deter criminal actions.

Since 1978, OIG's Office of Labor Racketeering (OLR) has conducted criminal investigations of fraud and corruption in union-affiliated (Taft-Hartley) pension and welfare plans. In doing so, OLR has found that unions such as the Teamsters and Laborers do not have a monopoly on fraud and that embezzlement, extortion, kickbacks, and similar crimes are not confined to union-affiliated benefit plans.

Accordingly, OIG is concerned about the fraud and corruption which is taking place today in non-Taft-Hartley employee health plans, for example, single employer plans, government employer plans, and a newer type of health plan often referred to as a "multiple employer welfare arrangement." In his written statement for today's hearing, Assistant Secretary Ball asserts that the nation's pension system has never been healthier, rather than the nation's pension and welfare system. I do not believe this is an oversight by the Assistant Secretary.

In this context, we are not talking about technical ERISA violations and we are not talking about individuals turning to

fraudulent schemes to avoid "cash flow" or similar operating difficulties. We are talking about professional and often sophisticated criminals who defraud and corrupt health plans for a living. PWBA has historically failed to deal with these types of professional racketeers, and this lack of emphasis must change in order to deter significant wrongdoing and protect plan participants and beneficiaries.

PWBA's reluctance to pursue criminal remedies is primarily the result of two intertwined factors:

- PWBA believes that ERISA is a "civil" statute, and;
- PWBA does not possess the tools necessary to investigate major benefit plan fraud and corruption.

Criminal investigators are not self-ordained. PWBA has no trained criminal investigators (as designated by OPM in its Series 1811 classification) and no present capability to employ more sophisticated investigative techniques such as electronic surveillance. PWBA's current enforcement staff are unlikely to be deputized by the Department of Justice and they are unlikely to recognize the application of fact patterns to Title 18 crimes such as RICO. The annual benefit plan reporting and disclosure forms ("Form 5500") which PWBA relies upon rarely, if ever, provide leads or other information regarding major employee benefit plan fraud. These types of complex cases generally require electronic surveillance, informants, and the execution of search warrants, as well as continuing working relationships with

other Federal and State law enforcement agencies and prosecutorial offices. PWBA is poorly equipped for these tasks. Professional law enforcement personnel know where to look for criminal behavior.

Assistant Secretary Ball has stated that additional staff positions are being specifically budgeted for ERISA enforcement, both for investigators and for attorneys. OIG commends this decision, but with reservations. This staff increase must be accompanied by a commitment that these resources will be used effectively and efficiently, and will be used to increase the quantity and quality of criminal investigations.

Will the 33 added attorneys be assigned only to civil remedies, which is likely because criminal prosecutions are exclusively handled by Department of Justice attorneys? Is the Department willing to meet the standards generally accepted by the investigative profession, for example those drafted by the President's Council on Integrity and Efficiency? The PCIE standards require that investigators possess professional proficiency for the task required, including appropriate education, training, skills, and abilities. These standards also require that the investigative organization be free from impairments to independence which might restrict independent and objective investigations and reports. I would remind this Subcommittee that Congressional doubt about the commitment and

integrity of DOL's labor-management criminal enforcement efforts led to the statutory placement of the Department's labor racketeering function in the Office of Inspector General in 1978.

Given these concerns regarding cost-efficiency, we continue to disagree with those who are opposed to using the experience and expertise of the Office of Inspector General. In 1987, OIG began to employ its Office of Investigations (OI) to conduct investigations of fraud and corruption in single employer benefit plans (independent of its OLR jurisdiction). Within 18 months, these efforts resulted in several significant prosecutions involving benefit plan managers and professionals. For example:

- The owners of a employee welfare plan contractor were indicted for defrauding the plan of \$700,000 through inflated commission fees. The individuals were convicted, sentenced to prison and probation, and fined.
- An individual indicted for submitting approximately \$200,000 in false claims to a medical plan administrator for services never rendered received three years imprisonment, probation, and was ordered to pay restitution to the plan.
- Six individuals were convicted in New Mexico on charges of mail fraud, embezzlement, and conspiracy in a case involving the theft of over \$9 million from pension funds.

However, OI's efforts also incurred the wrath of DOL management, which resulted in a March 1989 Department of Justice opinion, which limits OIG's statutory criminal investigative authority to cases where DOL funds or employees are involved, and prevents the Secretary from delegating her own investigative authority to OIG.

The Inspector General Act should be specifically amended by Congress to allow all Inspectors General to conduct criminal investigations of programs regulated or administered by their respective agencies, regardless of whether direct agency funds are being spent. If permitted, we are confident that we can increase the protections for non-union single employer and multiple employer benefit plan participants through effective criminal investigation, prosecution, conviction, and deterrence. It is difficult for me to understand why the Department of Labor is so adamantly opposed to the possibility of additional criminal investigations and (hopefully) convictions, by OIG or any other law enforcement organization, as long as the necessary coordination is maintained.

OIG is particularly interested in pursuing criminal investigations of fraudulent multiple employer welfare arrangements (MEWAs), which have become a major problem in recent years. These MEWAs solicit small companies seeking health care coverage for their employees and the sales pitches are made with full knowledge that the trusts are insolvent and cannot possibly meet their reimbursement liability.

Mr. Chairman, the scope of this MEWA problem is difficult, if not impossible, to determine. However, 34 states recently sent representatives to a seminar on this subject on very short notice, because each of these 34 states has had to deal with

fraudulent MEWAs and with workers who have been stuck with large, unreimbursed medical bills.

State enforcement agencies have been frustrated in their attempts to address these fraudulent MEWAs -- frustrated by multi-state fraud schemes, limited resources, and historical unresponsiveness by DOL. When state insurance officials attempt to investigate and regulate these plans, they often encounter claims of preemption under ERISA. Even though these claims are generally meritless, state officials often require DOL assistance to demonstrate this fact, and the officials to whom we have spoken have uniformly decried the lack of assistance they have received from DOL. Hopefully this situation will change in the near future, because PWBA has recently instituted a multi-part program designed to provide MEWA-related technical assistance to state officials.

Although the states are not preempted from prosecuting MEWAs criminally, they are often prevented from doing so for practical reasons, such as the inability to obtain physical jurisdiction over persons and assets. According to the state officials we have spoken to, PWBA has not shown any significant interest in pursuing these criminal cases. Criminal investigative action is urgently needed and, within the last year, OIG has begun to use its OLR jurisdiction to open approximately two dozen criminal investigations involving MEWAs.

In January, a joint investigation involving OLR and other federal and state law enforcement agencies resulted in an indictment charging four operators of a MEWA and a third party administrator with embezzlement and making and receiving kickbacks. This MEWA allegedly provided health benefits to approximately 9,000 employees and dependents of nearly 300 companies located in 16 states.

Even more could be done if OIG's Office of Investigations were permitted to conduct criminal investigations in this area. Unfortunately for those victimized by fraudulent MEWAs, this is not possible in light of last year's DOJ opinion.

OIG Recommendations

The Office of Inspector General submits the following recommendations concerning ERISA enforcement:

1. Congress should make clear, through legislation, that the Department of Labor Inspector General has authority to conduct criminal investigations of employee benefit plans.
2. Congress should remove the limited scope exemption for IPA audits.
3. Congress should include public sector employee benefit plans in the relevant Title 18 criminal provisions.
4. Congress should study the enforcement, or lack thereof, of benefit plans with fewer than 100 participants.
5. The Department of Labor should require direct reporting of ERISA violations by IPAs to senior plan management and to the board of directors or its audit committee, and to PWBA.

Thank you for your interest this morning. I would be pleased at this time to respond to any questions.

Senator METZENBAUM. Thank you, Mr. Maria.

Commenting on your last statement, when Mr. Ball appears, I will ask him whether the Department of Labor will support legislation to achieve that objective, because I feel certain that I can get a number of members of this committee, on both sides of the aisle, to support it. I think you are trying to do the job. I think that the Department of Labor ought to be helping, not hindering you, and I think if the Department doesn't help, then we in Congress should.

Is the Inspector General's office continuing to work with the accounting profession to improve the ERISA reporting process, or have those negotiations been brought to a conclusion?

Mr. MARIA. Mr. Chairman, we have been for a number of months making our views known with respect to procedures we believe should be appropriately incorporated into the audit guide.

Initially, we were optimistic regarding a resolution between our point of view and that of the American Institute of CPA's. I'd like to have Mr. Peterson, who is intimately involved in these negotiations, comment.

Senator METZENBAUM. Would you State your name, please, sir.

Mr. PETERSON. Gerald Peterson. I am the Assistant Inspector General for Audit.

Senator METZENBAUM. Thank you.

Mr. PETERSON. As Mr. Maria said, we have been working with the committee, the AICPA committee, that has been formed to update the audit guide during the past year. However, over the past month or so, since we have taken a position that was somewhat contrary to their position that they were taking in the guide, as of Friday, we have been disinclined. They asked us not to show up at their committee meetings. They are meeting, I understand, this week in Arizona, and they have asked that we no longer provide IG assistance to that committee.

So as of today, Mr. Chairman, we are out of the loop.

Senator METZENBAUM. And who is the chairman of that committee?

Mr. PETERSON. A fellow by the name of Andy Capelli from the AICPA is the chairman of that group. He called our representative Friday afternoon and asked that we not attend the current meeting.

Senator METZENBAUM. And where is that meeting taking place?

Mr. PETERSON. It is taking place in Arizona, I believe, Mr. Chairman.

Senator METZENBAUM. If you would be good enough to find out where it is taking place, I will share with Mr. Capelli my views, since they don't want to hear from you, and I haven't yet been disinclined. I will try to call him today.

Mr. PETERSON. I will get you that information, Mr. Chairman.

Senator METZENBAUM. Thank you.

Mr. Maria, in the first Inspector General report criticizing the Department of Labor's enforcement of ERISA, several parallels to the savings and loan crisis were noted. Could you explain the reasons why there may be similarities between these two situations?

Mr. MARIA. Similarity number one, from our standpoint—the savings and loan fiasco, tragedy, whatever term one wishes to apply, I think demonstrated very clearly that assets held in a regu-

lated institution weren't necessarily properly managed, nor were they necessarily safe.

With regard to our studies on the Independent Public Accountants' role, we learned, of course, that assets held in trust in a pension plan could be, by a plan administrator, according to ERISA, excluded from audit review. This gave us great concern because, as we learned in the S and L's, not everything held in a regulated institution could be deemed safe and appropriately managed.

We also found that there was an underlying assumption which created this exemption in ERISA, the assumption being that assets held in a regulated institution were in fact being subjected to some regular audit process. Our reviews disclosed that the audit process of those assets held in trust was sporadic at best. We did not have continuous audit coverage to provide any degree of safeguard, or an adequate degree of safeguard, for plan participants. That is comparison number one.

Comparison number two is that early in 1989, GAO conducted a study of selected financial institutions which had experienced insolvencies in the Southwest. Approximately 25 institutions were subjected to GAO examination. Their conclusions were that, number one, the Independent Public Accountants who examined those institutions had failed to identify and report on mismanagement practices, indeed, irregularities and situations indicative of fraud; and then the GAO also found that Federal regulatory agencies with oversight had failed to provide adequate oversight and review.

Those findings parallel our findings with respect to the Employee Retirement Income Security Act.

We have been criticized for drawing the comparison. We think it is valid, and we stand by it.

Senator METZENBAUM. Let me just see if I get this clear in my own mind. First of all, you have a situation where you don't have adequate auditing and accounting practices in order to see to it that the funds are secured. Second, you have the failure of the accounting profession to be willing to certify with respect to certain concerns to which you have already addressed yourself.

Third, you have the situation where many of the pension funds are invested in financial institutions, a number of which are insurance companies. Now, we know that problems have developed in some of the insurance companies by reason of the deterioration of the junk bond market.

Are you familiar with the fact that some of those funds are invested in insurance companies that are very heavily invested in real estate, and although the laws require those insurance companies to State their assets with respect to the junk bonds and the deteriorated value, there is no requirement that those same insurance companies evaluate their real estate investments on the basis of the market conditions but rather, merely on the basis of what the original appraised value was, even though that appraised value may have gone down very, very substantially, and nobody is paying any attention at all to the fact that they do not adjust their financial statements to the market conditions of the real estate market; does that concern you some—do I make myself clear?

Mr. MARIA. You make yourself abundantly clear, Mr. Chairman. It doesn't concern me "some"; it concerns me a substantial amount.

The question I would raise is, from a plan sponsor's standpoint, from a fiduciary standpoint, if in fact you are going to find a substitute for that defined benefit, how much diligence and how much prudence went into making certain that, in fact, that benefit could be delivered in future years.

I feel pretty secure, because my annuities are guaranteed by "Uncle Sugar".

Senator METZENBAUM. If things keep going the way they are, we'll have to worry about that, too—but I hope not.

But I would say that this is an area that I think the Congress must give its attention to and that the Department of Labor ought to be giving its attention to, and frankly, I think that the condition of the American insurance industry is a matter to which we must address ourselves as an issue separate and apart from this particular hearing today.

Is it your view that the current system of requiring annual financial audits does anything at all to enhance ERISA enforcement?

Mr. MARIA. The audit could be very critical to improving the enforcement process if properly discharged—if the scope were proper, if appropriate procedures were applied. This is the process that we have been involved with for some 12 months, and I don't think it is premature to mention it. We are very concerned about the usefulness of the audit. But properly conducted, it could be very critical again to providing plan participants with meaningful information, bearing in mind that ERISA, I think, was conceptualized as creating a reporting and disclosure system which would keep participants informed. Participants, indeed, were to be the first line of defense against mismanagement and corruption. Obviously, they are the beneficiaries; they have a vested interest in determining that plans are managed properly—pension plans and welfare plans.

But if the audit is not performing as expected, the larger question is: Then, why have it at all? Why pay fees for something that gives you no level of comfort? I think we are very close to recommending to Congress that unless the procedures that we have recommended indeed be incorporated—and we need no legislation to have the American Institute of CPA's incorporate appropriate responsible procedures—if our recommendations aren't adequately heeded, we are close to recommending that the audit requirement be eliminated.

Senator METZENBAUM. In essence what you are saying is that if the audit isn't worth something, then why pretend that it is worth something; it would be better to have no audit at all.

Mr. MARIA. It would certainly save substantial fees.

Senator METZENBAUM. How can criminal enforcement be improved, either by changing the statute or by a different enforcement approach?

Mr. MARIA. I think criminal enforcement can be improved with respect to benefit plan abuse by concentrating the criminal enforcement effort in one office, in an office of the Inspector General that indeed has specialized training to address serious corruption—again, not accidental or technical acts, but serious corruption. And by concentrating it in one office, we can, in fact, establish priorities

and assure that the most egregious criminal abuses in fact are addressed.

I think we need to change that opinion from the Department of Justice. The Department of Justice isn't going to recant. Congress needs to make its intention known that the Inspector General should, in fact, be pursuing serious corruption.

Senator METZENBAUM. Mr. Maria, I may have some additional questions, and I would guess that some members of the staff may have additional questions. Your testimony has been very helpful. I think you are a courageous public official. We appreciate your efforts as well as Mr. Peterson's efforts, and we look forward to working with you. We think the government needs more people like you who are trying to do the job that has to be done.

Thank you very much.

Mr. MARIA. Thank you, Mr. Chairman.

Senator METZENBAUM. Mr. Ball, this is not an easy responsibility for me at this moment because I really think you are a pretty nice guy. But I am frank to tell you that I am disappointed so far in your tenure at the Department of Labor.

You know that I had many concerns about your confirmation. I delayed it for a matter of about six months, and then I changed my view and I agreed to your confirmation because I had received many assurances from the Department of Labor and some of my colleagues that you would be an effective and good Assistant Secretary.

I am frank to tell you I am concerned. I have continued concerns. Since your confirmation, I know of nothing you have done except to speak out for the business community and assure them that pensions are going to be left alone, that "We won't touch pensions."

Quoting from your speech in the Washington Post: "Official Urges Hands-Off Private Pension System" and "The Bush Administration's top pension overseer, rejecting suggestion that the Nation's \$1.7 trillion private pension system could become a financial crisis as big as that in the savings and loan industry, yesterday warned against any attempts at regulation that would restrict the flow of investment capital." You go on to make your statement before the U.S. Chamber of Commerce.

I think you are looking at the wrong end of the tube. You are worried about investment capital and restrictions on that. Many of us are concerned about the ability of the retired worker to collect the money, promised to him—will it be there?

I have asked my staff to check, and maybe we have overlooked something, but frankly, since your confirmation, to the best of my knowledge—and I may be wrong, and I hope you will correct me and point out that I am wrong—I know of no instance in which you have spoken out for the concerns of the workers and the solidity of the pension funds. You have spoken out for the business community.

You once said that if you were confirmed, you would devote yourself to protecting the benefits upon which millions of workers and retirees depend. I hope you'll tell me when you took the first step. I am waiting to hear about something that you did to protect the pension rights of American workers.

I am concerned about those rights and the opportunity to collect, not just today, but I am concerned about the serious problem that exists as addressed by Mr. Maria, and frankly, I hope that in your testimony today you will give me some reassurance that something is happening that I don't know about, but I have not seen it. I want you to succeed. However, the issue is not merely about having this \$1.7 trillion available for investment purposes; it is a question of how it is invested, how well it protects the rights of the pensioners and the retirees.

I would like also to know what the Department of Labor position is with respect to the matters just addressed by Mr. Maria.

Having said that, Mr. Ball, I am happy to have you with us.

**STATEMENT OF DAVID GEORGE BALL, ASSISTANT SECRETARY,
PENSION AND WELFARE BENEFITS ADMINISTRATION, U.S. DE-
PARTMENT OF LABOR, ACCOMPANIED BY ALAN LEBOWITZ,
DEPUTY ASSISTANT SECRETARY**

Mr. BALL. Thank you, Senator Metzenbaum.

It is a great honor to testify before you this morning. Since I first testified before you in 1984, I have admired your vigilance in enforcing ERISA, and I am looking forward to working with you as we go forward in enforcing the pension laws.

Senator METZENBAUM. Thank you.

Mr. BALL. Perhaps you were not aware that the very first speech I gave when I came to the Department of Labor was on enforcement. I would be happy to provide you with a copy of that speech. It continues to be my absolute number one priority.

The Secretary has implemented a three-part strategy to improve ERISA enforcement. First, a significant request for new budget resources is included in the Department's fiscal year 1991 request. Second, the Secretary is conducting a Department-wide enforcement review. Third, the Department is putting together a legislative package aimed at ensuring the integrity of private employee benefit plans.

For fiscal year 1991, the Department will seek 133 new staff to bolster our enforcement program. We are seeking 100 new positions in the Pension and Welfare Benefit Administration for civil and criminal enforcement of ERISA, a 33 percent increase in our enforcement staff. This will greatly enhance our ability to enforce ERISA.

When staff is hired and trained, we would expect an additional 1,000 investigations and reporting reviews. The Department is also seeking a substantial increase in legal staff to prosecute the expected increase in ERISA cases.

Shortly after taking office, Secretary Dole directed a thorough and comprehensive review of all departmental enforcement strategies and activities. Particular emphasis has been placed on criminal enforcement and its proper role in the Department's overall enforcement strategy. The Department is giving serious consideration to recommendations made by the Office of the Inspector General concerning ERISA enforcement. In response to those recommendations, the PWBA is reviewing proposals regarding the work of independent public accountants who audit employee benefit plans, in-

cluding proposals that you have just heard from the Inspector General to repeal the limited scope audit exception, require compliance audit testing—

Senator METZENBAUM. I think I missed that. Say that again.

Mr. BALL. The Inspector General is recommending the repeal of the limited scope audit exception, and the Department supports that recommendation.

Senator METZENBAUM. Good.

Mr. BALL. We also support the approach that he outlined with regard to compliance audit testing, namely putting pressure on the professional organization to adopt compliance testing.

Senator METZENBAUM. Good.

Mr. BALL. Additional measures to strengthen enforcement are also under review. We are reviewing methods of enhancing private enforcement of ERISA by plan participants and beneficiaries. We are also considering ways to strengthen sanctions and penalties to provide adequate deterrence. We are committed to completing this effort by March 15th.

Before I get to the specifics about our enforcement program, I would first like to address a number of issues raised by the Department's Inspector General.

The Department's Inspector General has alleged there has been a decline in investigative activity. Press reports have said that the number of PWBA investigations dropped from 8,000 to 1,500 between 1978 and the present. It is important to note that the drop in work load numbers during that period was attributable to the way in which investigations were counted. In 1978 the Department counted any review, including reviewing Form 5500's, as an investigation, whereas today only cases formally opened for investigation are so counted.

It was also stated that 1,200 cases would have to be dropped because of the Justice Department's Office of Legal Counsel's determination that the Inspector General did not have the authority to conduct program-related investigations. As it turned out, there were only 300 active cases, and only four related to employee benefit plans. Those four cases and a few additional cases were referred to PWBA, and we are working on them now.

The Department welcomes the IG's scrutiny, and we will continue to work with the IG to improve ERISA oversight. The IG reports have, however, done a disservice to workers and retirees by comparing the pension system to the savings and loan crisis. Let me State unequivocally the pension system has never been healthier.

I am also concerned that because of the inflammatory savings and loan rhetoric, workers and retirees may have become unduly alarmed about the security of their pension benefits. Before ERISA was enacted in 1974, only 35 percent of defined benefit plans had sufficient assets to meet their liabilities. In 1988, 80 percent of these plans were fully funded. In addition, pension assets have grown from less than \$290 billion in 1974 to \$1.7 trillion today.

We have seen no evidence of widespread and systematic fraud and abuse of benefit plans. In one effort to determine if this were the case, we looked at plans that were terminated without sufficient assets to pay benefits. We found no correlation between un-

derfunded plans and legal activity. Of the 1,500 underfunded plan terminations handled by the PBGC in its 16-year history, there was evidence of fraud, embezzlement or abuse in fewer than 10 plans. Benefit promises were frustrated in these cases because of systematic but perfectly legal underfunding of the plans, not because of fraud or abuse. Congress acted, with this committee's leadership Mr. Chairman, in 1987 to correct the problem of underfunding.

This is not to say that ERISA enforcement cannot be improved. There certainly are people who are negligent in performing their fiduciary duties, and there are some people who will embezzle from and perpetrate fraud against plans. For this reason we must be vigilant in the enforcement of ERISA. As wrongdoers find new and more sophisticated ways to commit fraud and abuse, we have to find new and more effective ways to protect employee benefit plans.

I would like now, Mr. Chairman, to describe our targeted enforcement program, and with your permission I would like to use the chart that I have here.

[The chart referred to follows:]

PENSION ENFORCEMENT STRATEGIES



strategy is composed of separate and distinct elements:

COMPUTER TARGETING:

System reviews every annual report for violations (Similar to IRS system)

AUTOMATED CORRESPONDENCE:

System sends out notification if there is any deficiency in a plan's annual report

SIGNIFICANT ISSUES CASES:

Number of plans affected by review of service providers and financial institutions that service pension and welfare plans

MANUAL TARGETING:

Review of annual reports by PWBA'S
15 enforcement field offices



U.S. Department of Labor
Pension and Welfare
Benefits Administration

Mr. BALL. Perhaps the best way to illustrate how targeted enforcement works is to imagine a series of circles, rather like a target at rifle practice.

I would like to emphasize, Mr. Chairman, that these circles are separate circles. They are not cumulative. But we put them in the form of a target because it helps to communicate the fact that we do targeted enforcement.

The largest circle encompasses the entire universe of pension and welfare plans which file annual 5500 reports. This universe is examined by our new ERISA information system, a comprehensive computer database which will enable us to electronically select plans based on a computer model indicating likely violations. With the use of the new database, every Form 5500 filed will be subject to an automated review.

The IRS Service Centers receive the Form 5500 filings, keypunch the data and subject it to a comprehensive series of automated edit tests to determine whether the required information is present. Deficient filings are identified, and correspondence is generated to the filer, providing notification of the deficiency and requesting that it be corrected.

This group constitutes a second circle on the target. If the deficiency is not corrected within 30 days, a second letter is sent, followed by a third letter after an additional 30 days.

This system began operating this past summer, with the early experience indicating that nearly 90 percent of the deficiencies are corrected as a result of the first letter.

The third circle on the target is made up of plans which are reviewed as part of our enforcement strategy implementation plan. This program focuses our resources to deliver the greatest deterrent effect and to safeguard the largest number of plans. Our enforcement strategy focuses primarily on large plans, those with over 100 participants, and on financial institutions and service providers. While large plans constitute only about 6 percent of all plans, they constitute nearly 90 percent of all plan participants and approximately 84 percent of all plan assets.

With respect to small plans, because most small plans are dependent on outside service providers such as consultants, plan administrators, banks and investment managers, we are able to magnify our impact on small plans by focusing on service providers doing business with hundreds and in some cases thousands of employee benefit plans.

Our enforcement strategy also calls for the investigation of the service providers to welfare plans. Because a given service provider will service several welfare plans, the deterrent effect of this strategy is greater than if investigative resources had been concentrated on only one plan.

In 1989 under this strategy, we completed 525 such significant issue investigations. Over the last three years, we have closed 1,013 cases that were related to this enforcement strategy involving 119,000 plans and 11 million participants.

The fourth circle encompasses leads gathered from field office projects and referrals to field offices generated by the national office. Also, investigations are opened based upon information provided by participants, referrals from the Internal Revenue Service

as a result of their investigations, financial regulatory agencies, and other leads.

Senator METZENBAUM. Could you wind up, please, Mr. Ball?

Mr. BALL. The last circle is the bull's-eye in the center of the target. In 1989 we conducted a total of 1,581 targeted investigations. The result of these investigations was that we concluded 508 cases through voluntary compliance, initiated 43 civil actions in Federal District Court. PWBA also closed 28 criminal investigations, which resulted in obtaining 11 indictments.

I have other information in my prepared statement, Mr. Chairman, with regard to MEWA's, which you may want to talk about, and perhaps I could discuss that at that time——

Senator METZENBAUM. With regard to what?

Mr. BALL. MEWA's, the welfare plans that the Inspector General was talking about.

I have some comments on the purchase of annuities upon plan termination; I can deal with that later, if you would like me to.

[The prepared statement of Mr. Ball follows:]

STATEMENT OF DAVID GEORGE BALL
ASSISTANT SECRETARY OF LABOR
FOR PENSION AND WELFARE BENEFITS
U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON LABOR
OF THE
U.S. SENATE COMMITTEE ON LABOR
AND HUMAN RESOURCES

MARCH 6, 1990

I. INTRODUCTION

Mr. Chairman and Members of the Subcommittee, my name is David George Ball. I am the Assistant Secretary of Labor for Pension and Welfare Benefits. I am pleased to appear before you today to report on the Department of Labor's enforcement efforts under the Employee Retirement Income Security Act of 1974 (ERISA).

ERISA, as you know, was enacted to protect the retirement income and welfare benefits of the nation's private sector work force. Presently, 76 million Americans are covered by more than 900,000 pension plans and 4.5 million welfare plans. Altogether, ERISA plans hold over \$1.8 trillion in assets, with ERISA pension plans holding \$1.7 trillion. Under ERISA, the Secretary of Labor is charged with the responsibility of protecting these assets on behalf of participants and beneficiaries.

Before I get into specifics about our enforcement program, I would first like to state unequivocally that the pension system has never been healthier. I am deeply concerned that, because of

some inflammatory rhetoric, workers and retirees may have become unduly alarmed about the security of their pension benefits. Before ERISA was enacted in 1974, only 35% of defined benefit plans had sufficient assets to meet their liabilities. In 1988, over 80% of these plans were fully funded. In addition, assets from all pension plans have grown from less than \$290 billion in 1974 to \$1.7 trillion today.

We have seen no evidence of widespread and systematic fraud and abuse of benefit plans. In one effort to determine if this was the case, we looked at plans that were terminated without sufficient assets to pay benefits. We found absolutely no correlation between underfunded plans and illegal activity. Of the 1,500 underfunded plan terminations handled by the PBGC in its 15 year history, there was evidence of fraud, embezzlement or abuse in fewer than 10 plans. Benefit promises were frustrated in these cases because of systematic, but perfectly legal, underfunding of the plans; not because of illegal activities. Congress acted, with this Committee's leadership, in 1987 to correct the problem of underfunding.

This is not to say there is no room for improvement. There certainly are people who are negligent or indifferent in performing their fiduciary duties and there are some people who will abuse, embezzle from and perpetuate fraud against plans. For this reason we must always be vigilant in the enforcement of

ERISA. As wrongdoers find new and more sophisticated ways to commit fraud and abuse, we have to find new and more effective ways to protect employee benefit plans. Secretary Dole and I are absolutely committed to protecting the integrity of the private employee benefit system, and we have undertaken a major enforcement effort.

II. DEPARTMENT INITIATIVES

On January 29, it was announced in the President's budget that we will be seeking 100 new positions for civil and criminal enforcement of ERISA, a 33 percent increase in our investigative staff. This represents the largest increase in PWBA enforcement positions since ERISA's enactment and will greatly enhance our ability to enforce ERISA. The Department is also seeking a substantial increase in legal staff to prosecute the expected increase in ERISA cases. This major increase in staff is concrete evidence of the Administration's commitment to strong and effective enforcement of ERISA.

Shortly after taking office, Secretary Dole directed a thorough and comprehensive review of all Departmental enforcement strategies and activities. Particular emphasis has been placed on criminal enforcement and its proper role within the Department's overall enforcement strategy. This enforcement review, which is designed to identify areas where enforcement

strategies and activities can be enhanced, underscores the Secretary's vigorous commitment to fulfilling the Department's enforcement mission.

The Department is also giving serious consideration to recommendations by the Office of the Inspector General concerning ERISA enforcement in general. In response to those recommendations, the Department is reviewing proposals regarding the work of independent public accountants ("IPAs") who audit employee benefit plans. Proposals under review include repealing the limited scope audit exception, requiring compliance audit testing, and requiring peer review of IPA's work. We are committed to completing this effort by March 15th.

Furthermore, the Pension and Welfare Benefits Administration ("PWBA") has undertaken a number of other enforcement initiatives. For example, an Office of the Chief Accountant was established within PWBA in 1988 to work with the accounting profession to improve employee benefit plan accounting, audit procedures and practices. A process has been established under which PWBA refers substandard accounting work to the AICPA for disciplinary action. A new computer database system has been created that will enhance our ability to effectively target employee benefit plans with the highest potential for ERISA violations.

In addition, the Department is currently reviewing various options for increasing private civil enforcement of ERISA with a view to determining whether any cost effective means can be devised to assist private plaintiffs in bringing civil actions. It is still too early to tell what recommendations, if any, will be made in this area.

III. ERISA'S MANDATE

ERISA was enacted to safeguard the pension and welfare benefits of America's private sector workforce. ERISA seeks to ensure that all plan sponsors deliver their promised benefits.

Prior to ERISA, workers had few assurances that plan sponsors would actually deliver promised pension and welfare benefits. Also, accurate information concerning plan requirements was not always disclosed to the workforce. ERISA addressed these abuses by giving participants and beneficiaries of employee benefit plans certain rights: the right to an explanation of a claims denial; the right to a full and fair review of that decision; and the right to sue in court if they are still aggrieved. ERISA also created reporting and disclosure requirements, established fiduciary standards of conduct, and prohibited certain transactions between plans and parties in interest and gave participants and beneficiaries the right to sue in court to enforce these provisions as well.

Title I's reporting and disclosure requirements protect participants' rights by requiring plans to disclose basic plan information to participants, beneficiaries and to the federal government. Plans must also file detailed annual financial reports, the Form 5500 series, with the federal government.

Although ERISA is primarily a civil statute, the Act provides certain criminal sanctions to protect the rights of participants and beneficiaries. ERISA provides significant criminal penalties for willful interference with a participant's rights under the Act and for willful violations of other Title I provisions. Additional criminal sanctions applicable to employee benefit plans are found in Title 18 of the U.S. Code. These include theft or embezzlement from employee benefit plans, false statements and concealment of facts in relation to documents required by ERISA, offer, acceptance or solicitation of consideration to influence the operation of employee benefit plans, and conspiracy.

However, as I said, ERISA itself is primarily a civil statute. It provides a broad range of equitable relief for breaches of fiduciary duty, including providing restitution to the plan and removing fiduciaries and service providers and preventing them from serving in such capacities. In the case of a prohibited transaction, the Secretary may assess a civil penalty against the

party in interest. In addition, plan administrators who fail to file a complete and timely Form 5500 series report may be assessed a civil penalty of up to \$1,000 per day. Moreover, Congress recently enacted a penalty equal to twenty percent of the amount recovered by the Secretary based on a breach of fiduciary duty, or other violation of Title I of ERISA.

IV. PWBA ENFORCEMENT PROGRAM

I would now like to provide you with some background information regarding the Department's enforcement of the rights of participants and beneficiaries under ERISA.

Within the Department of Labor, PWBA is responsible for the administration and enforcement of ERISA. PWBA's Office of Enforcement consists of a National Office and fifteen Field Offices located throughout the nation.

The National Office's enforcement program, which provides policy direction and technical and management support to the Field Offices, consists of three divisions: the Division of Field Operations, which is responsible for oversight of the Field Offices; the Division of Enforcement Support, which provides technical assistance and administrative support to the Field Offices; and the Division of Investigations, which conducts sensitive policy and high visibility investigations.

Presently, there are 303 authorized staff personnel in the Office of Enforcement. Of this total, 266 are Field Office employees, and 234 of them are investigators, auditors or supervisory investigators. There are also 37 employees in the Office of Enforcement in the National Office. The National Office's Division of Investigations currently has 8 staff members, 7 of whom are investigators. The new Office of the Chief Accountant has 11 employees in its Division of Reporting Compliance.

PWBA recruits investigators and auditors with backgrounds in law, accounting and finance. Investigators come to PWBA from other federal agencies, as well as private sector law and accounting firms. PWBA also recruits qualified graduates directly from professional schools.

All investigators attend PWBA's training courses, which offer intensive training on such topics as fiduciary responsibility, investigatory techniques and plan accounting. The courses are taught by PWBA investigators and program officials, attorneys from the Solicitor's Office, as well as private sector experts from the fields of finance and banking. This training is designed to give investigators specialized knowledge in areas related to ERISA enforcement. Advanced courses are conducted by PWBA in employee benefit plan accounting and investigative issues related to financial institutions. In addition, many of our

investigators attend specialized training in detecting and conducting criminal investigations. PWBA is developing a course in criminal investigative techniques which will be conducted in June of this year.

Our enforcement program is augmented by our public information and assistance program. This program deals with a significant number of inquiries from pension and welfare participants seeking assistance in collecting benefits and obtaining information about ERISA. It also responds to plan sponsors and practitioners seeking clarification or information about their responsibilities under the law. In 1989 this program handled 67,050 inquiries and recovered \$ 8,200,995 for plan participants and beneficiaries.

V. TARGETED ENFORCEMENT

REVIEW OF ANNUAL REPORTS:

I would like to describe our targeted enforcement program. IRS service centers receive the Form 5500 report from the approximately 900,000 pension and welfare plans that are required to file. They key punch the data and subject it to a comprehensive series of automated edit tests to determine whether all of the required information is present. Interim edit reports are provided to the Department. This process identifies deficient filings and generates correspondence to the filer

providing notification of the deficiency and requesting that it be corrected. If the deficiency is not corrected within 30 days, a second letter is sent, followed by a third after an additional 30 days. This system just began operating this past summer. Early experience indicates that nearly 90% of the deficiencies have been corrected as a result of the first letter.

For those filings with deficiencies still remaining after three rounds of correspondence, civil penalties of up to \$1,000 per day may be imposed under the authority provided in section 502(c)(2) of ERISA. This new statutory authority applies to all reports due for plan years beginning after January 1, 1988. It requires that the report be rejected by the Office of the Chief Accountant as deficient and that the filer be afforded an additional period to correct the deficiency. If the filing is not corrected, the civil penalties may be assessed. In addition, an independent accountant may be engaged by the Department to produce an acceptable report. The Office of the Chief Accountant is currently in the process of implementing this program. The first reports which are subject to the penalty, that is, those that have already gone through three cycles of correspondence and are still deficient, should be available next month.

Once the automated edit checks are complete, the IRS forwards tapes containing all of the data to FWBA. The data is then subjected to a comprehensive automated review using specialized

targeting criteria. PWBA developed these targeting techniques from experience in investigating ERISA violations. Annual reports which contain information which may be indicative of a violation are identified through this process, the report is flagged by the system and provided to the Field for a determination of whether an investigation should be opened.

This sophisticated automation system, which also incorporates a case management information system, will allow us to conduct a review of all plan filings and maintain computer information on the investigations which are undertaken. This will enable us to considerably strengthen the deterrent effect of our enforcement program, better manage cases and evaluate the results of targeting and investigative techniques.

ENFORCEMENT STRATEGY IMPLEMENTATION PLAN

In order to establish policy direction and focus our enforcement efforts, the Department established an Enforcement Strategy Implementation Plan. This plan focuses our resources to deliver the greatest deterrent effect and to safeguard the largest number of pension and welfare plans. Our enforcement strategy focuses primarily on large plans, those with over 100 participants, and on financial institutions and service providers.

While our primary focus is on large plans, we do target small plans as well. In order to leverage our resources, our enforcement strategy provides that 50% of our efforts are devoted to cases involving service providers and financial institutions. Most small plans are dependent on outside service providers such as consultants, plan administrators, banks and investment managers. Through this strategy, an investigation of one service provider or financial institution may impact hundreds, and in some cases thousands, of employee benefit plans.

Under this strategy, we completed 525 such "significant issue" investigations in 1989. Over the last 3 years, we closed 1,013 such cases involving 119,000 plans and 11 million participants.

PWBA targets additional cases for investigation through a variety of ways. Many of our cases are based upon leads gathered from individual Field Office initiated projects. Other sources of cases are information and complaints provided by participants, referrals from the Internal Revenue Service, financial regulatory agencies and other leads. Finally, cases are also opened based upon referrals to Field Offices from our National Office.

In summary, in 1989 we conducted a total of 1,581 investigations. The results of these investigations were that we concluded 508 cases through voluntary compliance and initiated 43 civil actions

in federal district court. PWBA also closed 28 criminal investigations and obtained 11 indictments.

We are pleased with the results we have achieved. In the last 5 years we have closed 8,268 cases which resulted in the recovery of over \$480 million. Our targeting efforts have been successful, as we uncover ERISA violations in one of every three cases we investigate. We believe that in future years our new computer data base will generate an additional stream of targeted investigations and generate even better results. I am proud of PWBA's enforcement results, and believe we have developed a highly effective targeting program.

VI. CIVIL AND CRIMINAL ENFORCEMENT

Some have questioned the balance struck between civil and criminal enforcement. Cases are opened based on the types of issues and violations involved. During the course of an investigation, following the collection of facts, a determination is made regarding the most appropriate disposition. The evidence obtained in the overwhelming majority of our investigations does not warrant criminal prosecution. However, if facts indicate that a criminal violation may have occurred, a delegation is sought from the appropriate United States Attorney's Office and the case is pursued as a criminal case.

When the Department finds a civil violation, it often seeks voluntary compliance. A violator is notified of the Department's view of the violation and the corrective action that must be taken. However, the Department's policy is not to obtain voluntary compliance in cases where there is a potential for serious abuse, but instead, to seek a judicially enforceable court order and injunction.

Court decrees, obtained by the Office of Solicitor, may include injunctive relief barring the fiduciary or other culpable parties from service to plans and the appointing of independent fiduciaries to manage the plan. Monetary relief will be obtained if there has been any loss to the plan. When the Department cannot obtain a favorable court decree by agreement, contested litigation will result.

VII. AGREEMENTS WITH OTHER GOVERNMENTAL AGENCIES

In addition to our own independent enforcement efforts, PWBA has entered into agreements with a number of other governmental agencies to coordinate enforcement activities. PWBA and the Office of the Inspector General/Office of Labor Racketeering (OIG/OLR) have been operating under a Memorandum of Understanding

under which information is exchanged with respect to organized crime activity in the employee benefit plan field.

PWBA also has a Memorandum of Understanding with the federal financial regulatory agencies--Federal Reserve Board, Comptroller of the Currency, Federal Deposit Insurance Corporation, Federal Home Loan Bank Board and National Credit Union Administration--by which these agencies refer to the Department suspected ERISA violations arising out of their audits. We have a coordination agreement with the Internal Revenue Service (IRS) which establishes procedures which apply to all civil examinations conducted by PWBA and IRS involving employee benefit plans. In addition, the two agencies may use special procedures where appropriate, including joint investigations. PWBA receives enforcement related information from the Securities and Exchange Commission. The Department also works closely and coordinates with the Pension Benefit Guaranty Corporation on matters concerning pension issues when appropriate.

Coordination with state and local agencies is the responsibility of each PWBA field office. PWBA field offices have information sharing agreements with the various state banking and insurance commissioners which provide for the sharing of information obtained under their respective statutory authorities.

Finally, a Memorandum of Understanding entered into between the Secretary of Labor and the Department of Justice provides guidelines for the investigation of criminal matters related to

ERISA. In addition, PWBA field offices routinely confer with the local U.S. Attorney's office about specific criminal cases.

Because special attention has been focused recently on a number of specific issues related to ERISA enforcement, namely, Multiple Employer Welfare Arrangements, continuation of health coverage (COBRA) violations, and the fiduciary requirements concerning purchasing annuities upon termination, at this point, I would like turn to a discussion of those issues.

VIII. MEWA'S

Multiple Employer Welfare Arrangements

Multiple Employer Trusts (METs) or Multiple Employer Welfare Arrangements (MEWAs) are health benefit arrangements that are particularly susceptible to abuse. Stated most simply, METs or MEWAs are group trusts used to fund health benefit plans, typically for small employers. These arrangements are often marketed at premium rates that are substantially below rates for comparable coverage from insurance companies, and are thus especially attractive for smaller businesses who find it very difficult to obtain an affordable health program for their employees.

In concept, these arrangements would appear to fill an important void in health care availability. In practice, they are too often woefully underfunded and, therefore, unable to pay claims. In the worst situation, they are run by individuals who bleed them dry through extraordinarily high fees and outright embezzlement.

Because METs and MEWAs are organized as trusts, they seek to avoid regulation by state insurance authorities regarding such matters as required reserves and contributions. They do this by claiming that ERISA's broad preemption provisions prohibit states from imposing such requirements. The fact is, in the more than 15 years since ERISA's enactment, it has been extraordinarily rare for the Department to find a MET to be immune from state insurance regulation because of the law's preemption provisions. Furthermore, Congress amended ERISA in 1983 to make clear that states would be free to regulate these programs under their insurance regulations without the risk of ERISA preemption.

The fact that our rulings have made clear that the states have had authority to regulate the typical MET, and that Congress has amended ERISA to make certain of that result, is often conveniently ignored by promoters of METs and MEWAs. Despite our educational efforts, and the efforts of the National Association of Insurance Commissioners, state regulators and prosecutors often do not understand that they have all the regulatory power

that they need under existing law to police METS and MEWAs. To remedy this lack of understanding, we are planning a series of steps to address this situation. The Department is preparing technical assistance and "plain English" materials to be given to state insurance departments explaining the Department's and the states' roles with respect to MEWAs. We are expediting the processing of MEWA related Advisory Opinions. Finally, we are expanding the sharing of information with state enforcement agencies and insurance commissioners in matters related to MEWAs.

I should also point out that while METs and MEWAs may not themselves be plans; as trusts, they hold the assets of the various individual plans who fund their benefits through them. Therefore the promoters of these arrangements are fiduciaries under ERISA, subject to our investigative and enforcement authority, including, where the facts warrant, criminal proceedings. At the moment we have several MET/MEWA cases in progress and expect to continue to emphasize these cases under our significant issue enforcement strategy. Also, in order to assure maximum possible cooperation with state authorities, we have directed our 15 Field offices to make all disclosable portions of their files available to their state colleagues upon request, and to continue to build on the positive working relationships that already exist in many parts of the country.

We regard the MET/MEWA situation as a very serious one. In all candor, however, I must tell you that neither we nor anyone else has an accurate picture of the scope of the problem. One possibility we have under consideration is requiring all MET/MEWAs to file reports or registration statements with the Department. This would enable both us and the states to get a handle on the number and location of these entities.

IX. COBRA

Continuation of Health Benefits

The Consolidated Omnibus Budget Reconciliation Act (COBRA) requires health plan sponsors to provide terminated employees and beneficiaries with the opportunity to receive continued health benefits at group rates. The Department is committed to vigorously investigate COBRA violations and to enforce the rights of participants under the Act. The Department has recently initiated two enforcement actions with respect to COBRA. In September of last year, the Department filed a lawsuit under COBRA alleging that a Minneapolis-based corporation failed to allow several employees the option to elect to continue their group health benefits. This case was recently settled. Also, last month the Department obtained a consent order requiring a major airline to adhere to a specified timetable in providing eligible individuals with their COBRA benefits.

X. PURCHASE OF ANNUITIES UPON PLAN TERMINATION

Recently, questions have been raised concerning the methods used by plans to select insurance carriers which provide annuity contracts upon plan termination. Such questions have generated considerable concern among workers and retirees. The Department's longstanding policy is that the purchase of annuities following a plan termination is subject to the fiduciary responsibility rules, including the prudence requirement, of Title I of ERISA.

I would like to state unequivocally, Mr. Chairman, that Secretary Dole and I will take whatever action is necessary to ensure that ERISA's fiduciary rules are complied with in matters related to the decision-making process that leads to the selection of a particular insurer to provide annuities upon plan termination. To this end, the Department is considering taking a number of steps to ensure the integrity of the selection process. We are working closely with the PBGC to develop appropriate criteria for the agency to consider when approving a termination. We are also investigating plans to determine whether plan fiduciaries have complied with their responsibilities under ERISA in these situations. If we find abusive practices in the selection of an annuity provider, we will continue to take action to protect the rights of participants.

Let me assure you, Mr. Chairman, that Secretary Dole and I are committed to making certain that the pension promises made to participants are kept. We will continue to take whatever action is necessary to ensure that the fiduciary rules under ERISA intended to ensure security of pension benefits are not compromised when annuities are purchased upon termination.

XI. CONCLUSION

We must be vigilant in enforcing ERISA against fraud and abuse. Secretary Dole and I are committed to strong enforcement of ERISA. America's private workforce must be assured that promised benefits will be delivered. The Department will continue to bring civil and criminal enforcement actions when appropriate. Given the substantial investment of resources in our advanced database system, and the Department's request for 100 new enforcement positions for PWBA, there should be no doubt that Secretary Dole stands committed to dedicate the time and resources necessary for successful enforcement of ERISA. Over 70 million Americans depend on the Department of Labor to protect their hard-earned benefits and I want to ensure the American people that we will do just that.

Senator METZENBAUM. We are under some time pressure to give up this room.

I gather the thrust of your comments is that the Department is doing a good job in audits and investigations, and the system, according to you, has never been healthier.

Mr. BALL. There is one qualification to that, Mr. Chairman. I think I would like to carve out the MEWA area. I'd like to make a distinction between welfare plans in general, which are healthy, and we are conducting a very successful enforcement effort with regard to welfare plans in general. In the MEWA area that was discussed by the Inspector General, I think there are some things we can do to strengthen our enforcement effort.

Senator METZENBAUM. Let me ask you this. You indicated that the Department has reversed its position about cutting off the Inspector General's ability to pursue criminal investigations. Has that position of the Department of Labor been implemented, and in what manner?

Mr. BALL. I think you are referring to the Justice Department opinion.

Senator METZENBAUM. Yes.

Mr. BALL. I am not really the person to speak to that. I understand the Solicitor of the Department of Labor supports the Department of Justice decision, but I would have to ask to submit something for the record with regard to that opinion. I have to defer to the Solicitor with regard to that opinion. I do not think he has reversed his position.

Senator METZENBAUM. I see. I thought you had said something about supporting the right of the Inspector General to pursue criminal investigations, and regular investigations as well, but that the Department supports Justice Department opinion. Why do you support it? Why don't you want the Inspector General to have that full investigative authority?

Mr. BALL. I can't speak for the Solicitor. I understand he does support that decision. The Pension Welfare Benefits Administration does not conduct civil or criminal investigations; it just simply conducts investigations. It takes these investigations wherever they may lead. Sometimes a targeted investigation is opened, and within a month or two of the investigation we identify criminal matters. What we do at that time is to refer that matter to the U.S. District Attorney and work with the U.S. District Attorney in pursuing a criminal investigation.

Senator METZENBAUM. Would the Department of Labor support legislation to restore the Inspector General's authority to pursue criminal investigations and prosecutions?

Mr. BALL. I would have to defer to the Solicitor, Mr. Chairman. I understand the Solicitor supports that opinion. I think it is unlikely that he would have reversed his opinion, but I would like to submit something for the record in answer to that question.

Senator METZENBAUM. You say he supports the opinion. I am now asking you about supporting legislation, because the opinion may be based upon what the Inspector General and the Justice Department consider to be the present law. I am saying we make laws here, and I am asking the Department of Labor will they support a

change to give the Inspector General that right to conduct investigations, and if you won't, why won't you?

Mr. BALL. I believe that the Inspector General has done a useful job in pursuing criminal investigations, but at the same time, it would be a mistake for me to misrepresent to you the criminal enforcement activity that results from the work of the Pension and Welfare Benefits Administration.

We do work with the U.S. District Attorney in pursuing criminal investigations. We do not rely solely on the Inspector General to pursue criminal matters.

Senator METZENBAUM. I am not suggesting that you be deprived of your right to continue your own efforts in this direction. What I am asking about is why you would be opposed to the Inspector General having the right to pursue criminal investigations; why as a matter of policy would the Department of Labor do that? I am really asking you, as the person in charge of this area for the Department of Labor, what your recommendation would be to the Secretary of Labor and to the Administration with respect to giving the Inspector General the authority that he previously had.

Mr. BALL. As you know, and as I mentioned, the Secretary is conducting an enforcement review of the work of the Department. We have also asked for additional staff not only in the Pension and Welfare Benefits Administration but also in the Office of the Solicitor, 100 additional people in PWBA and 33 additional lawyers in the Office of the Solicitor, to pursue investigations. This will include criminal investigations.

Senator METZENBAUM. Let me say, Mr. Ball, I think I am asking you a question that you may want to discuss with the Secretary and perhaps with others in the Administration. I am asking whether or not the Department of Labor will support legislation to give the Inspector General the authority heretofore discussed, and if not, why not. I would like an answer from you within one week. If I do not get an answer, I will assume the Department of Labor is following its present procedure of opposing giving the Inspector General the right that he had prior to the Department of Justice's opinion. But I'd like to hear from you within the week.

Mr. BALL. I'd be glad to provide you with a response to that.

Senator METZENBAUM. Now, you said something about the pension and welfare benefit system in this country never being healthier. You also said there is no evidence of widespread fraud and abuse. Well, I don't know how widespread it has to be, but the Inspector General has made some very specific assertions in that respect, and it seems to me that where you have that kind of specificity, it is difficult to say there is no widespread evidence of fraud and abuse.

But when you say that the system has never been healthier, I want you to explain that to me in view of the fact that the Pension Benefit Guaranty Corporation has \$3.2 billion in assets, \$4.2 billion I think it is in liabilities, or something like that, which means that they are \$1 billion underfunded at this moment. That does not include the potential couple of billion-dollar claim that they would incur if LTV wins in the Supreme Court, and it doesn't include such obligations as may be incurred with respect to some potential situations—I think a couple of the airlines may need relief from

the responsibility for the payment of those pensions. I just don't understand how you and I—I think we are both reasonably intelligent people—you say it has never been healthier, and I say I think it is in real trouble, and it is a disaster waiting to happen. Maybe I don't understand something, but why do you think it is so healthy?

Mr. BALL. I was really speaking in the context of the comparison which the Inspector General had made between the pension system and the savings and loan situation.

I feel that what the Inspector General has done is exaggerate the problem, rather like crying "Fire" in a crowded theater.

I am not representing to you that there is not fraud and abuse out there, Senator. There certainly is fraud and abuse, and we should be vigilant. We need to find more ingenious ways to fight fraud and abuse, and we are doing just that.

The thing that I am concerned about is that, by exaggerating the problem, the Acting Inspector General has frightened pensioners in an inappropriate way. The fact of the matter is, as I mentioned in my testimony, that pension assets totaled \$290 billion in 1974 when ERISA was enacted; today they total over \$1.7 trillion. Pension plans were only 35 percent funded in 1974; today they are over 80 percent funded.

This is one of the great success stories of the American economic system, and while there is fraud and abuse, it is a mistake to exaggerate the proportion of it because it frightens people and makes them worry whether their benefits are safe.

Senator METZENBAUM. Is it not the fact that there are some major funds in this country, from some of America's largest companies, that are seriously underfunded at this moment?

Mr. BALL. Yes, in certain industries, that is true, Senator.

Senator METZENBAUM. And that same industry did go through some very perilous times just a few years ago, causing some additional alarm as to the financial stability of the PBGC.

Mr. BALL. PBGC's deficit is not attributable to fraud and abuse. It is attributable to legal underfunding which the Congress, under your leadership, acted to correct in 1987, and the legal underfunding will not continue because the funding rules have been changed. But the PBGC deficit is not due to fraud and abuse.

Senator METZENBAUM. How much are the steel pension funds underfunded at this moment?

Mr. BALL. Senator, I do not know an exact amount, but I think the purport of your question is whether it is a very, very large amount, and I think it is.

Senator METZENBAUM. Let me ask you a question about the Pacific Lumber case. The Pacific Lumber case involves a company that was taken over by another corporation, and the new owners influenced the pension plan trustees to purchase annuities from an insurer, and the trustees themselves had never solicited nor received a bid from that insurer, and the company that took over Pacific Lumber did so with, I think it was a \$340 million loan from the insurance company, that had not been included as one of the companies solicited for a bid from the trustees.

A top official of the takeover company, called in the middle of the night and urged the trustees to solicit a bid from that company that had loaned the takeover company \$340 million. After that call

in the middle of the night, that company, that hadn't even been on the trustees' original list, wound up receiving the contract for the annuity.

Now, my question to you is do you think that the trustees who took that direction from the corporate management added a company that they had not included on their list originally—they certainly knew of the big financial investment that that insurance company had in the takeover company—do you think there was some violation of ERISA's fiduciary standards in that situation?

Mr. BALL. Senator, the Pacific Lumber case is currently under investigation by the Department of Labor, and it would not be appropriate for me to comment on that investigation, but I would be glad to respond to the general tenor of your question with regard to the fiduciary responsibilities of the trustee in selecting an insurer.

Senator METZENBAUM. OK.

Mr. BALL. The only criterion that applies in the case of a selecting insurer is the exclusive purpose rule. In other words, the insurer must be selected on the basis of solely what is in the best interest of the plan participants.

In a case where there is a question of a conflict of interest, which is what you have raised, or self-dealing, as a general matter, it would be a violation of ERISA if you were not acting solely in the best interest of the participants.

However, whether or not there is a conflict of interest in the particular case has to be determined on the facts and the circumstances.

Senator METZENBAUM. Mr. Ball, I practiced law before I came to the Senate; I was the head of several different business corporations before I came to the Senate. And I think I am a reasonably intelligent man. But I can't understand for the life of me why it has taken two years for the Department of Labor to come to a decision with respect to the Pacific Lumber matter. You say you can't comment on that matter that is pending. You can comment on what the hell is going on. What are you doing with your time and your effort? What is the Department of Labor doing? What takes so long to arrive at such a simple conclusion? This is not a complicated matter. What are you doing with yourself?

All I hear from the Department of Labor is, "We are studying this," "We are investigating this," "We are thinking about it, we are considering it." You've got all the language. But when are you going to get some action? When are you going to say whether or not what the trustees did in the Pacific Lumber case was or wasn't right?

You did not act with respect to the Coleman Lantern case until the company reversed itself the night before our hearing. When is the Department of Labor going to get off its butt and do something about some of these matters, or say that everything is fine, and they did everything they should have—take a call in the middle of the night, get instructions, and then proceed. When are you going to do something?

Mr. BALL. Senator, I can understand your frustration at the fact that the Pacific Lumber investigation has taken two years. In my own defense, I would point out that I was sworn in on November

6th. I have since that time put a great deal of energy and effort into working with my staff on the Pacific Lumber case. It is an active case. It is not a dormant case. Our investigations are gathering facts. I have met with the staff on many occasions to discuss it, and I hope that we will bring it to a resolution very soon.

Senator METZENBAUM. Do you know how much Pacific Lumber took out of that when they terminated the pension plan?

Mr. BALL. It was tens of millions of dollars. I don't have the exact number in my head.

Senator METZENBAUM. It is often said that civil penalties are just a cost of doing business for employers, but jail terms count. Probably one of the greatest scandals in this country at the moment is that white collar criminals never go to jail. They do community service work. They get a slap on the wrist. The corporation pays a fine, but white collar criminals don't go to jail.

Some matters that have occurred in this area, as I see it, truly warrant people going to jail when they take dollars that belong to retired workers. Yet I don't know of much that the Department of Labor has done in the area of criminal enforcement, and to the best of my knowledge I don't know of any criminal prosecution brought against an individual by reason of the Department of Labor's action. I do know of the Inspector General's actions, but what about the Labor Department? Have you brought any actions in which the individuals are placed in jeopardy?

Mr. BALL. Yes, Senator, we have. As I mentioned in my testimony, I guess there are about 20 cases where we had criminal indictments. I would be glad to provide you with information with regard to those cases for the record.

Senator METZENBAUM. And what has happened in those cases?

Mr. BALL. In many of those cases the individual has gone to jail. He has been barred from future fiduciary functions. In 1989, we opened 31 criminal investigations, we closed 28, we had 11 indictments, 7 convictions or guilty pleas.

Senator METZENBAUM. And what were the penalties?

Mr. BALL. Well, as I mentioned—

Senator METZENBAUM. Did anybody go to jail?

Mr. BALL. Yes, sir.

Senator METZENBAUM. How many out of the 31?

Mr. BALL. I'd be glad to supply that information for the record.

Senator METZENBAUM. Do you think it was one or two?

Mr. BALL. No; it was more than that, Senator.

Senator METZENBAUM. More than that?

Mr. BALL. Yes, sir.

Senator METZENBAUM. I would be interested to know that, because I believe, as is so evident daily around here—every day you read another story about some defense contractor paying \$17 million, getting off scot-free as far as the executives are concerned; you read about BCCI laundering billions of dollars for drug dealers, and they get off scot-free; and some little yokel who cashes somebody else's Social Security check, he or she goes to the slammer. I am concerned that our government isn't willing to prosecute white collar criminals as enthusiastically as they prosecute those who have blue collars.

Mr. BALL. Senator, I am very concerned about criminal enforcement. As I mentioned, the first speech I ever gave in the Department of Labor was in regard to criminal enforcement. In that speech, I specified cases where individuals had been sent to jail.

I would like to request, Senator, that that speech be entered into the record.

Senator METZENBAUM. We'd be happy to do so.

[The speech referred to follows:]

FINAL

ASSISTANT SECRETARY DAVID GEORGE BALL
REMARKS AS DELIVERED
NATIONAL ASSOCIATION OF MANUFACTURERS
DECEMBER 13, 1989
WASHINGTON, D.C.

Thank you, Melissa, for that kind introduction. It is a privilege to be here with you this afternoon and with good friends like Dorothy Gusler of AMAX. For 94 years, the National Association of Manufacturers has played an important role in the United States in representing both large and small employers. I particularly appreciate the work of the Pension Subcommittee in helping provide and protect pension and welfare benefits for working Americans.

I am delighted to have with me Kathleen Harrington, Assistant Secretary for Congressional Affairs. Kathleen is a graduate of Colgate and also Catholic University. From 1987-1988, she was director of Elizabeth Dole's office of the Dole for President campaign. Kathleen has a great deal of experience in government and is a critical player in ensuring that the Department's position on pensions is represented effectively on the Hill.

As some of you may know, I was born in England where my father was a Baptist minister. As was common in Church homes when I grew up, we had on the walls of our house various religious pictures and biblical text. One of these texts said simply, "Thou God seest me". This text had a powerful impact on me because conversations in the home and also sermons which my

father preached in Church dwelled upon the fact that if the Good Lord could see even the smallest sparrow fall to the ground, he could certainly also see what his creatures were doing at all times.

Growing up in the Church also had other ramifications. My father felt very strongly that standards of conduct which he preached about on Sunday should be followed rigorously by members of his own family. This meant that we were not allowed to drink or smoke, play cards or even go to the movies. I can remember one time when I broke this rule and went to the local picture theatre. Half way through the movie I thought of that text, "Thou God seest me". This bothered me a great deal because it occurred to me that the Good Lord could see me sitting there at the movies. So I quickly got up and left in the middle of the movie.

Now that is an example of a powerful deterrent. And that is what I want to speak about today. I want to discuss the security of our nation's pension funds and targeted enforcement. My message is very simple: Do not underestimate the effectiveness of a small group in the Department of Labor in enforcing the pension laws.

First of all, to put everything in context, let me remind you that there is a huge pot of money out there. The private pension system is one of the great success stories of the American economy, and it has, by any objective measure never been healthier. In 1974, only 35% of defined benefit pension plans

were fully funded. In 1988, 80% of these plans are fully funded. Furthermore, the assets of pension plans have grown from less than \$290 billion in 1974 to \$1.7 trillion today. To put this number in perspective, the national debt is \$2.8 trillion. In other words, this is a lot of money! Under ERISA, the responsibility for protecting this huge pot of money on behalf of current and future retirees is placed with the Secretary of Labor.

The Secretary has the strong support of President Bush in backing her commitment to reasonable regulation and tough enforcement. In his first year in office, the President has shown his commitment to enforcement by moving to solve the savings and loan crisis and clear up any problems at HUD. OMB Director Richard Darman has put DOL's oversight of the pension system on a list of "high risk" programs to be monitored closely to prevent another scandal like that at HUD.

Let me say right up front that there are some racketeers and vipers out there. There are some people who perpetrate fraud, who embezzle and who abuse pension plans. For this reason we must always be vigilant in the endless battle to provide strong and effective enforcement of our pension laws. This is a top priority for the Secretary and for me. Let there be no doubt about that! As wrongdoers find new and more devious ways to commit fraud and abuse, we have to find new and more ingenious ways to defend the integrity of pension plans.

The Secretary and I are committed to protecting the integrity of those assets so that they remain secure and available to deliver promised retirement benefits. We have, in fact, undertaken a number of significant actions to enhance ERISA enforcement.

Many months ago, the Secretary directed a thorough and comprehensive review of all Departmental enforcement strategies and activities. She put particular emphasis on criminal enforcement! This enforcement review, which has been designed to identify areas where enforcement strategies and activities can be enhanced, has underscored her vigorous commitment to fulfilling the Department's enforcement mission. One matter under consideration and part of this review is whether the Secretary will recommend additional civil or criminal penalties for violations of ERISA.

In addition, the Pension and Welfare Benefits Administration ("PWBA") is separately developing specific proposals regarding the work of independent public accountants ("IPAs") who audit pension plans, including proposals to repeal the limited scope audit exception, require compliance audit testing, and require peer review of IPAs' work. We are committed to completing this effort by March 15th.

PWBA is also striving to develop a workable approach on direct reporting of ERISA violations by IPAs to the Department and other interested parties. The Department believes that such reports must be made within the framework of PWBA's new

computerized system for processing annual pension plan financial reports. We cannot effectively process a multitude of reports in differing formats from individual public accountants.

Furthermore, PWBA has also undertaken a number of other enforcement initiatives. For example, an Office of the Chief Accountant was established within PWBA in 1988 to work with the accounting profession to improve pension plan audit procedures and practices. A process has been established under which PWBA refers substandard accounting work to the AICPA for disciplinary action. A new computer database system has been created that will enhance our ability to effectively target employee benefit plans with the highest potential for ERISA violations. We are exploring means to promote private enforcement of ERISA by pension plan participants and beneficiaries, particularly since incentives appear to be lacking for potential plaintiffs to bring private enforcement actions. We are considering ways to encourage participants and beneficiaries to become partners in ERISA enforcement efforts.

I have already acknowledged that we must be vigilant against any abuse. Although we cannot precisely quantify the extent to which it threatens the nation's pension funds, it is important to distinguish between fraud and abuse on the one hand and systematic underfunding on the other, so that we do not exaggerate the problem. There is a major difference.

To put this distinction in perspective, it is useful to note that systematic underfunding, which was perfectly legal, has

resulted in plans, such as the LTV pension plan, having insufficient assets upon termination. This, in turn, has generated huge actual or potential liabilities for the Pension Benefit Guaranty Corporation. Recently, ERISA's minimum funding rules were substantially strengthened by Congress to ensure that plan participants and the Government's insurance program would not be harmed due to underfunding of plans. However, this has absolutely nothing to do with fraud or embezzlement.

The distinction can be put into sharper focus by referring to the records of the Pension Benefit Guaranty Corporation (the "PBGC"). Over its entire 15 year history the PBGC has terminated and taken over more than 1,500 defined benefit pension plans. The overwhelming majority of these plans were sponsored by companies that systematically, but legally, underfunded their plans. Only a very small percent of these terminations were the result of embezzlement, fraud or abuse. This gives us some idea of the order of magnitude of two quite different problems.

If we fail to make this distinction, we may end up being very confused and exaggerating the magnitude of the danger. We may end up doing more harm than good. We might, for example, frighten or alarm the nation's current and future retirees rather like shouting "fire" in a crowded theatre. Scare tactics are uncalled for and inappropriate. We must be vigilant but we should not panic. Are the wrongdoers out there committing fraud and abuse? Yes, of course, they are and we are going to do something about it. We must always be alert and find new ways to

strengthen enforcement. However, will fraud and abuse lead to a collapse of the pension system? No, it will absolutely not!

One consequence of underestimating the effectiveness of PWBA is that potential violators could get the mistaken impression that they are unlikely to be caught -- and that if they are caught, the only consequence will be, at the worse, a slap on the wrist. This is simply not the case! The odds of being caught are very real and the consequences can certainly include criminal prosecution. The enforcement staff has limited resources, and a primarily civil strategy. But it is highly effective in its results!

Let me describe how our enforcement strategy works. Perhaps the best way to describe targeted enforcement is to show you a series of circles rather like a target at rifle practice. The largest circle encompasses the entire universe of approximately 900,000 pension and welfare plans which file annual 5500 reports and which benefit over 70 million working or retired Americans. This universe is examined by our new ERISA information system. Over the past few years, we have developed a comprehensive computer database which will provide us with the ability to electronically select plans based on a computer model indicating likely violations. With the use of the new database, every Form 5500 filed will be subject to an automated review using 95 specialized targeted objectives.

The IRS centers which receive the 5500 filings, key punch all of the data and subject it to a series of approximately 130

automated edit tests to determine whether all of the required information is present. This process identifies those cases where deficiencies are found, and correspondence is generated to the filer providing notification of the deficiency and requesting that it be corrected. This group constitutes a second circle on the target and is made up of approximately 360,000 plans covering an estimated 28 million Americans. If the deficiency is not corrected within 30 days a second letter is sent, followed by a third after an additional 30 days. This system began operating this past summer with the early experience indicating that nearly 90% of the deficiencies are corrected as a result of the first letter.

For filings with deficiencies remaining after three rounds of correspondence, civil penalties of up to \$1,000 per day may be imposed under the authority provided in section 502(c)(2) of ERISA. This new statutory authority applies to all reports due for plan year beginning after January 1, 1988. It requires that the report be rejected by PWBA as deficient and that the filer be afforded an additional period to correct the deficiency. If the filing is not corrected the civil penalties may be assessed and an independent accountant may be engaged by DOL to produce an acceptable report. PWBA is currently in the process of implementing this program, which should begin operation next month.

The third circle on the target is made up of approximately 80,000 plans with an estimated 5 million people which are

reviewed as part of our enforcement strategy implementation program. This program focuses our resources to deliver the biggest bang for the buck and affect the most pension plans. The way we are able to do this is to focus primarily on large plans, those with over 100 participants and on financial institutions and service providers to those plans. While large pension plans constitute only about 6% of all plans, they constitute nearly 90% of all plan participants and approximately 84% of all plan assets. Because most small pension plans are dependent on outside service providers such as consultants, plan administrators, banks and investment managers, we are able to magnify our impact on small plans by focusing on those who provide services to hundreds and in some cases thousands of employee benefit plans. In 1989, this program resulted in the completion of 525 "significant issues" investigations. Over the last 3 years, we closed 1,013 cases that were related to this enforcement strategy involving 119,000 plans and 11 million participants.

The fourth circle encompasses informal reviews by our 10 field offices and by experts in our national office. It is estimated that these general investigations informally review 28,000 plans a year covering 3 million Americans. In 1989 this review together with certain other sources, such as tips, stories in the media and referrals by other agencies, led to 1,056 targeted investigations.

Finally, the last circle is the bull's eye in the center of the target. In 1989, we conducted a total of 1,581 targeted investigations. The results of these investigations were that we concluded 508 cases through voluntary compliance and initiated 43 civil actions in federal district court. PWBA also closed 28 criminal investigations which resulted in obtaining 11 indictments.

By zeroing in from the outside of the target toward the center, we are able to eliminate those cases where an investigation is not likely to be fruitful. By consciously focusing our investigations on those plans and service providers which have profiles that our experience has shown may lead to ERISA violations, we have been successful in uncovering ERISA violations in more than 1-out-of-every 3 case investigations. We are targeting our investigations by and large on plans which have a high chance of violating the law. A high percentage of violations uncovered by investigations, namely 1 out of 3, is evidence of the success of our targeting efforts. We hit the bulls eye more than 33% of the time. In other words don't underestimate the effectiveness of PWBA in enforcing the pension laws.

We are proud of the results we have achieved. In the last 5 years we have closed 8,268 cases which resulted in the recovery of over \$480 million and all of this before our new computer analysis is fully operational. We believe that in future years our new computer database will generate an additional stream of

targeted investigations.

In evaluating the effectiveness of PWBA, it is useful to consider what happens at the Securities and Exchange Commission. Even though we have a much smaller staff, I believe that the SEC is an appropriate role model for the Pension and Welfare Benefits Administration. Both agencies do targeted investigations -- but neither of them has criminal investigators. In both instances, once an investigation turns up evidence of significant criminal activity, the matter is referred to the appropriate U.S. Attorney for possible prosecution. The objective reality is that the overwhelming preponderance of cases for both agencies are civil cases. In 1988, for example, the SEC closed a total of 2,620 investigations and inspections of investment companies, investment advisors, broker dealers, transfer agents and other entities. During the same period, the SEC initiated 234 civil actions and administrative proceedings and obtained approximately 50 criminal indictments. This balance between civil and criminal actions is similar to that of PWBA where the agency conducted 1,621 targeted investigations, concluded 553 cases through voluntary compliance and initiated 27 civil actions in federal district court. PWBA also closed 23 criminal investigations which resulted in obtaining 12 indictments in 1988. Despite this mix between civil and criminal investigations, the SEC has an excellent reputation for integrity and for the effectiveness of its enforcement strategy.

While the bulk of our cases are civil, I do not want to leave you with the impression that we have neglected criminal cases. In the last 3 fiscal years, we have closed 76 criminal investigations which resulted in obtaining 35 indictments.

Let me give you some specific examples:

- o In January 1988, Herbert L. Freel, former owner of Charles McArthur Dairy Farms, Inc. of Okeechobee, Florida, was convicted of 6 counts of mail fraud and 1 count of embezzling nearly \$800,000 from the firm's profit sharing plan. He was convicted on charges he defrauded the profit sharing plan by making loans from the plan to 2 corporations set up by him under his daughter's name and was engaging in mail fraud to further his scheme to embezzle plan funds. He was sentenced to serve 4 years on each count to run concurrently and was also ordered to make restitution. This case resulted from an investigation conducted by the Miami office of PWBA and the FBI.
- o In March 1989, James E. Trainer and David K. Rittman, 2 Iowa employee benefit plan administrators were convicted on 10 counts of embezzling over \$247,000 and 1 count of conspiring to embezzle from welfare benefit plans to which they provided third party administrative services. They served as officers of Total Group Services, Inc. of Iowa (TGSI). They were charged with overcharging on stop-loss insurance premiums and

withdrawing funds from plan accounts purportedly to pay service medical provider fees when, in fact, the funds were diverted to TGSi bank accounts. They were sentenced to two years in prison and required to make full restitution as well as pay a special assessment to the victim protection fund. The criminal action resulted from an investigation by PWBA's St. Louis district office. The case was prosecuted by the USDA's office in the Southern District of Iowa.

- o In November 1989, Sherman E. Armstrong, the former owner of the now defunct Armstrong Mold Inc. of Winchester, Indiana, was sentenced to 3 years in prison, placed on 5 years probation, and fined \$20,000 for embezzling over \$200,000 in pension assets and falsifying plan records. This case resulted from an investigation conducted by the Cincinnati office of PWBA and the FBI.

In addition to the prison terms and fines, all of these gentlemen were barred from holding any position with an employee benefit plan.

The message for the new generation of racketeers is clear. The risk of civil and criminal prosecution may well be higher than you think. Don't underestimate the effectiveness of a small, dedicated enforcement staff in the Department of Labor. We have all pension plans on our radar screen! We are zeroing in

on fraud and abuse. You are in the center of our target!

If you in this distinguished and most honorable audience forget everything else I have said today, please remember my text. "Thou God seest me."

Thank you and God bless you!

Senator METZENBAUM. Mr. Ball, according to the GAO, out of the 300 fiduciary violations found each year, the Department only removes about 20 fiduciaries a year. Why should anyone who has willfully violated ERISA be permitted to continue as a fiduciary—obviously, a lesser penalty than the matter of criminal prosecution—but why, out of 300 fiduciary violations, only 20 fiduciaries are removed a year? Why would the number be that low when there are that many fiduciaries violating ERISA?

Mr. BALL. Senator, it would depend on the facts and circumstances in each case. Without having the facts in front of me, it is difficult to say. Sometimes the fiduciary violations might have been in ways that did not actually damage the plan. The plan could have even been better off in some cases. You just have to look at the facts and circumstances. But the Department does not shrink from requesting serious sanctions if it is appropriate in the particular case.

Senator METZENBAUM. Mr. Ball, I'd like you to supply me with a list out of the 300 violations during the last year where any fiduciary was on the list for violation because he or she had done something to improve the plan—because I believe that of the 300, without looking at it, I would have to guess that 295 of them had done things to hurt the plans and in some instances to help themselves.

Mr. BALL. Well, obviously, Senator, I didn't mean to suggest that that was the case, but facts and circumstances may show that the nature of the offense does not warrant as severe a sanction. It just depends on what the facts and circumstances are.

But I will provide that information for you, Senator.

[Information follows:]

U.S. Department of Labor

Assistant Secretary for
Pension and Welfare Benefits
Washington, DC 20210

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

Enclosed are our responses to questions raised at the March 6, 1990, hearing of the Subcommittee on Labor concerning the Department of Labor's enforcement of the Employee Retirement Income Security Act (ERISA). The questions you raised relate to the disposition of investigations conducted by the Pension and Welfare Benefits Administration's (PWBA) enforcement program. In accordance with your request, I have also enclosed a copy of the December 13, 1989 speech I gave before the National Association of Manufacturers which addresses the issue of ERISA enforcement and the rights of participants and beneficiaries under the Act.

We welcome the opportunity to provide the requested information and hope that our response will assist you and the Subcommittee. If you have any further questions, please feel free to contact me.

Sincerely,

*David George Ball*David George Ball
Assistant Secretary

Enclosures

Question:

How many cases were concluded by PWBA through voluntary compliance and litigation during fiscal year 1989? What is the total amount of plan assets recovered from these actions? What is the number of instances where individuals were removed from being a fiduciary to a plan?

Answer:

In fiscal year 1989, PWBA concluded 1,581 civil and criminal investigations of which 508 were closed after correction of fiduciary or prohibited transaction violation or where bonding, reporting, disclosure, and other non-fiduciary violations were corrected. Monetary recoveries totalled \$111 million and 71 persons were removed from being a fiduciary to an employee benefit plan.

Question:

Provide information on enforcement actions where the fiduciary is not removed from the plan.

Answer:

We have examined cases closed by PWBA during first two quarters of fiscal year 1990 (October 1, 1989 through March 31, 1990). During this period, PWBA closed 201 investigations, 133 of which involved fiduciary violations. Of these 133 cases, we selected a sample of closed cases to examine the issue of fiduciary removal. Please note that we have omitted the names of the cases and parties involved in those cases where no public action, such as a lawsuit, was taken.

A. FIDUCIARIES REMOVED

Investigations by PWBA of employee benefit plans may result in the removal of plan fiduciaries through the "voluntary compliance" process (i.e., correction of violation after notice of violation found in PWBA investigation), by the plan fiduciaries' own initiative, by court order issued by consent of parties, or after litigation. In addition, since ERISA section 411 automatically prohibits persons convicted of certain criminal offenses from serving as plan fiduciaries, an ERISA criminal conviction will result in fiduciary removal. Below are examples of cases involving the removal of plan fiduciaries.

1. This case involved fiduciary breaches by the plans' trustees in causing the plans to invest in various real estate related investments over a period of three years. The investments were not made in compliance with the plans' investment policy as to risk, security, and loan to market value ratios, nor did the trustees obtain legal opinions or other expert opinions on the legality and viability of the various real estate projects. Further, the trustees failed to adequately monitor the investment activity. As a result of the investments, the plans incurred losses of over \$3.1 million. This case resulted in the recovery of the investment losses to the plans, and the resignation of all the plans' trustees.

2. Dole v. Etscovitz. The Department filed a civil complaint in federal district court against the trustee of a pension plan, and a bank which was a party in interest with respect to the plan. The trustee was president and owner of more than 50 percent of the stock of the plan sponsors (although there were several sponsors, there was only one pension plan). The trustee violated ERISA by causing the plan to incur over \$200,000 in losses when he used its assets to secure and repay loans which had been made by the bank to the plan sponsors. The bank was charged with knowingly participating in the trustee's fiduciary breaches. The case was resolved by a consent order which permanently enjoined

the trustee from serving as an ERISA fiduciary. In addition, the \$200,000 was restored to the plan by the bank.

B. SERVICE PROVIDERS REMOVED

In addition to the removal of fiduciaries, PWBA has also obtained the removal of service providers to employee benefit plans.

1. This case was an investigation of an insurance company and its subsidiary, and two employee welfare benefit plans. It was determined that the insurance company failed to reduce premiums by the credits due the plans under the experience rated contract, and failed to refund excessive claims reserves, thus causing the plans to pay too much for their insurance coverage. During the course of the investigation, the plans' trustees were able to obtain restoration of \$285,000 from the insurance company in settlement of the misapplied experience credit issue, and \$200,000 of excessive claims reserves. The plans' trustees also voluntarily terminated their contracts with the insurance companies, and submitted their insurance needs to an evaluation and competitive bid process conducted by an independent actuary.

2. This investigation revealed that an investment manager caused 19 plans to invest over \$780,000 in two oil production payment programs in which the investment manager was a shareholder. The investigation resulted in the plans' fiduciaries terminating the investment manager. The plans were also able to obtain repayment from the investment manager of the principal and interest lost in the investments. Because this was the only instance in which the investment manager had ever violated ERISA, and because the investment manager personally lost more than any of the plans but repaid all moneys lost by the plans, PWBA did not seek an injunction against him to prevent future services to employee benefit plans.

3. This investigation disclosed that the plan's trustees entered into dental and vision care arrangements with a service provider for approximately \$15,000 per month (totalling over \$1 million) without a written contract and without competitive bidding. The trustees did not conduct feasibility studies and did not consult with experts in connection with the arrangements. Further, the trustees failed to monitor the services provided by the service provider to determine if the plan was receiving the services it had paid for. During the course of the investigation, the service provider was replaced, and it was determined that further action by PWBA was unnecessary.

C. PLANS BENEFITED

In some instances, PWBA investigations discovered violations of ERISA's fiduciary provisions, but the investigation resulted in positive results to the plans. Depending on the particular nature of such transactions, PWBA will seek correction of the

violations but not request removal of the fiduciaries. An example of such a case is found below.

This investigation disclosed that the profit sharing plan sold a parcel of real estate to a partnership of which a majority interest was held by plan trustees. The property was sold for over \$980,000, which was a fair price. In connection with the purchase, the plan paid over \$58,000 in real estate commissions to an unrelated third party real estate broker who arranged the sale. The real estate sale was not imprudent and the commission amount (6%) was not excessive. In fact, by selling the property, the plan made a reasonable profit. The plan fiduciaries restored the sales commission and lost interest on the commission amount in full to the plan.

D. PLANS UNHARMED

The decision to seek removal of a fiduciary is based upon the facts and circumstances of each case. Instances in which it is determined that the fiduciary breach actually resulted in a benefit to the plan are rare, but not without precedent. More common are the instances in which the fiduciary unknowingly or unintentionally violates ERISA. These cases often involve small dollar amounts, unsophisticated plan fiduciaries, and violations that often can be corrected by changes in plan administrative practices. Examples are as follows:

1. This investigation disclosed that a financial institution incorrectly routed funds from a number of plans to another division of the bank. The investigation resulted in the restoration of \$23,267 to the proper employee benefit plans. In our view, a permanent injunction of this financial institution from acting as a plan trustee to employee benefit plans was not justified based on the nature of the violation, the dollar amount involved, and the harshness of such action in light of the violation.
2. The plan trustee violated ERISA by investing up to 70% of the plan's assets in construction loans and failing to collect monthly interest on some of the loans. The trustee agreed to correction the violations by restoring almost \$24,000 in delinquent interest to the plan and reducing the plan's construction loan investments. Because the investigation did not reveal any imprudence in the underlying investments, or any type of improper arrangements, a decision was made not to require removal of the trustee.
3. In this investigation of two pension plans sponsored by one employer, it was discovered that the employer's \$8,000 contribution to the profit sharing plan had not been made; instead, it was carried on the books as a debt to the plan. In addition, an employer contribution had been improperly deposited by the plans' stockbroker in the profit sharing plan, rather than in the defined contribution plan. The principal amount and

interest of the delinquent contribution was restored to the profit sharing plan, and the stockbroker transferred the amount mistakenly placed in the wrong account. Although the trustee failed to correct the misdirected deposit, it was nevertheless made to a trust account for the benefit of the company's employees. Likewise, the \$8,000 contribution was carried on an accrual basis, fully disclosed on all plan returns. Thus, no action was taken to remove the plan trustee.

4. This investigation of a two related Taft-Hartley plans showed that the trustees failed to adequately monitor an agent whose job was to collect delinquent employer contributions on behalf of the plan. Because of this laxity, some employer contributions were as much as two to seven months late, resulting in lost earnings to the plans. The trustees restored over \$53,000 to the plans, constituting the lost earnings due to the late contributions. The amount involved in the violation, the nature of the violation, and the restoration of plan assets contributed to PWBA's decision not to remove the plans' trustees.

E. SUMMARY

The removal of a plan fiduciary is a severe intervention by the Department which is taken only in those cases which demonstrate egregious ERISA violations by the fiduciary. A decision concerning removal is made in each case considered on its own merits. As demonstrated above, there can be mitigating circumstances and other facts which will not justify such stringent penalty as removal. We do not believe that the removal of plan fiduciaries can be unequivocally justified as a result of a bad investment or as a result of every violation of ERISA and the regulations thereunder.

Many times a plan fiduciary does not agree with PWBA's findings of ERISA violations, but agrees to comply with the conditions imposed by PWBA because the dollar amounts are small or because of other considerations. This may occur, for instance, where no precedents have been firmly established. Such a case involved a bank's charging fees (sweep fees) to employee benefit plan clients for automatic cash management of the plans' funds. The bank repaid to its employee benefit plan clients a total of \$3,318 that it had charged, which PWBA believed was in violation of the fiduciary provisions of ERISA. The bank did not agree that it had violated ERISA, but still restored the assets to avoid protracted dealings with the Department. We believe that in such instances removal of the bank as a plan fiduciary would not serve any real purpose.

PWBA does seek the removal of plan fiduciaries who willfully and knowingly commit fiduciary breaches. PWBA recognizes, however, that removal is not an appropriate remedy in every case.

Question:

Provide a summary of PWBA investigations conducted during the last two fiscal years which resulted in a criminal indictment.

Answer:

The following is a summary of PWBA investigations conducted in the last two fiscal years which resulted in a criminal indictment. A total of twenty-four cases are summarized below from which the following information was obtained.

- Twelve individuals were sentenced to prison, with sentences ranging from 1 to 4 years. Ultimately, the final decision on sentencing is based on the Assistant United States Attorney's recommendations and the judge's decision.
- Twenty-five individuals indicted in the twenty-four cases were sentenced to probation, which ranged from one to ten years.
- Approximately, \$30,500 was assessed in fines. In addition, the court ordered restitution to the plans which resulted in approximately \$4,900,000 being restored to the plans.
- ERISA bars those individuals convicted of a felony from holding any position with an employee benefit plan for 13 years.
- This summary contains the names of the cases, as well as the parties involved, because criminal indictments are a matter of public record.

SUMMARY OF INVESTIGATIONS RESULTING IN CRIMINAL INDICTMENTS
DURING FISCAL YEARS 1989, 1988

1. Orange Belt Painters Pension

On October 4, 1987, Glenn C. Waggoner, Sr. entered a plea of guilty and was convicted of conspiracy to embezzle from an ERISA fund, in violation of Title 18 USC 371, 664 and offer, acceptance and solicitation to influence the operation of an employee benefit plan in violation of Title 18 USC 1954.

Waggoner was sentenced to one year probation with five years of supervisory probation.

2. Pye King/ Ernie Certified FD

Pye, Trustee of Ernie's Certified Mart, Inc., Profit Sharing Plan, pled guilty to one count of embezzlement Title 18 US 664 in the sum of \$40,000. On October 6, 1987, Pye was placed on probation for a period of five years on the condition that he comply with the general condition of probation and make restitution to the Plan in the sum of \$40,000.

3. Dorothy Brown, N.E. Pension Admin. Inc.

Dorothy Brown was the owner of Northern New England Pension Administrators (NNEPA), a Bangor, Maine company specializing in employee benefit plan administration. Brown, as Plan Administrator, had signatory authority over checking account belonging to several employee benefit plans.

On October 8, 1987, Brown pled guilty to four counts of embezzlement and was sentenced to a one-year suspended prison term, five years probation and ordered to make restitution in the sum of \$46,434.

4. Laborers LU 199 & 847 Pension Health & Welfare Fund

The investigation disclosed possible violations of 18 USC 1027, where the trustees used their positions as a basis to pay themselves approximately \$7,500 of personal expenses including air fare, lost wages and travel advances.

Following trustee Breeding's indictment, trustees DiSabatio and Warren entered into an agreement with the DOJ in return for its promise not to prosecute. Both men made financial restitution to the benefit plan totaling \$2,445, resigned from their trustee positions, and agreed not to serve as trustee to an ERISA plan for a five year period. On November 12, 1987 trustee Breeding made a similar agreement with the DOJ.

5. Dupage Boiler Works Inc. P/S

Morton Scherl (aka Robert Caldwell), former chairman of the Board, Jack Eberwein, former President, and William Goodstein, former Secretary & Registered Agent, all of Dupage Boiler Works Inc., converted the assets of the Dupage Amended Profit Sharing Plan to their own use.

On November 16, 1987, Eberwein pled guilty to other criminal violations. William Goodstein has been tried and found guilty of embezzlement of \$741,664 in plan assets in violation of 18 USC 664 and was sentenced to three years in prison, ten years probation, \$250 fine, 500 hours of community service, and ordered to make restitution in the amount of \$741,664.

Morton Scherl is a fugitive from justice and is wanted in both New York and Florida.

6. Albert Levin. Trustee

Albert Levin trustee and plan administrator of the Profit Sharing Trust of Premium Sales, Inc., knowingly, willfully and intentionally made a false statement and representation of fact in that Levin signed and submitted to DOL Form 5500 for the fiscal year ending 9/30/82, which stated that no assets of the plan had been lent to a party-in-interest. In fact, assets of the Plan had been lent to a party-in-interest.

On November 4, 1987, Levin entered a plea agreement where he agreed to make restitution, prior to sentencing in the sum of \$7,500. Levin received a suspended sentence on December 8, 1987, placed on probation for one year, and ordered to make restitution in the amount of \$7,500 pursuant to plea agreement.

7. Herbert L. Freel. Trustee

Herbert L. Freel, former owner of Charles McArthur Dairy Farms, Inc. and its subsidiaries of Okeechobee, Florida was convicted on six counts of mail fraud and one count of embezzling nearly \$800,000 from the firms' profit sharing plan.

Freel was convicted on charges he defrauded the profit sharing plan by making loans from the plan to two corporations set up by him under his daughter's name and for engaging in mail fraud to further his scheme to embezzle plan funds.

On January 8, 1988, Freel was sentenced to 4 years imprisonment and ordered to repay to the Plan \$770,500, the outstanding balance on the loans with interest.

8. Health Insurance Administrator (HIA)

Two high ranking executives of a Chicago area health insurance administration company were indicted for defrauding their company, Chicago area businesses and individuals, and two insurance companies of more than \$1.4 million between 1982 and 1986.

Charged in the fifteen count indictment were Joseph L. Jacobson, Chairman of the Board of the defunct HIA, and Robert B. Callaghan, HIA's former president and treasurer. Both men were charged with fourteen counts of mail fraud and one count of embezzlement from federally regulated employee welfare benefit plans.

On February 18, 1988, Jacobson was sentenced to 2 1/2 years in prison, 5 years probation, ordered to make restitution joint and severally with co-defendant Callaghan, received 1,000 hours of community service, a \$200 fine and ordered to participate in an alcohol and gambling treatment program. Callaghan was sentenced to 1 1/2 years in prison, 5 years probation on the condition he is enrolled in a gambling anonymous treatment program, ordered to

make restitution jointly and severally in the sum of \$1,461,832 with co-defendant Jacobson and ordered to fulfill 1000 hours of community service.

9. Jiri Vanourek, Trustee

Vanourek, owner of the defunct Soil and Crop Services Inc., was indicted by a federal grand jury in the U.S. District Court for the Eastern District of Washington on three counts of embezzlement totaling \$76,417.

The investigation revealed that Vanourek had converted plan assets to his own use by transferring shares of stock on three occasions from the Plan's account to the corporate account. The stock was then sold, with no proceeds going to the Plans.

Vanourek pled guilty and was convicted of the charges. On April 11, 1988, he was sentenced to a five year probation period and ordered to make restitution in the sum of \$76,417.87.

10. Charles Drewry II

Drewry, owner of Parr Elevator Inc. and a trustee of the company's profit sharing plan, was indicted on three counts of embezzling a total of \$129,783.84 from the Parr Elevator Inc., Profit Sharing Plan in violation of Title 18 USC 664. On March 25, 1988, Drewry pled guilty to one count of embezzling \$31,563.73.

On April 29, 1988, the U.S. District Court for the Northern District of Indiana convicted Drewry of one count of embezzlement. The sentence was suspended and Drewry was placed on unsupervised probation for one year.

11. IBEW LU 527 Electrical Trust

This case involves the Fund's former administrator, Ruth H. Brown, who filed and received payment from the Fund on unauthorized and unallowable medical claims totaling approximately \$4,300.

In addition, the former fund administrator wrote checks to herself and cashed checks endorsed over to her by a third party. There were no medical claims to substantiate the payments as reimbursement for medical expenses, totaling approximately \$31,500.

On June 27, 1988, Ruth H. Brown pled guilty to five counts of embezzling over \$10,000. Brown was sentenced to three years in prison, on the condition that she serve six months in a jail/halfway house facility, with the remaining sentence suspended and placed on supervised probation for five years. Brown was also ordered to repay \$9,100 in restitution and \$50 special assessment.

12. Floyd E. Donwerth

Donwerth pled guilty to two counts of embezzlement of \$75,000, each from a union vacation fund.

On October 28, 1988, Donwerth was sentenced on count 1 to three years confinement and ordered to make restitution in the amount of \$574,983.24. On count 2, Donwerth received a five-year suspended sentence on the condition that he serve 4 hours per week community service and make restitution in the above amount.

13. IU 109 Retirement & Welfare P/S

Benjamin, former union president and benefit plan trustee, Brown, former Vice-President of Midlantic National Bank and Panullo, former employer trustee for the Funds were indicted for embezzling and or conspiracy to embezzle \$1,400,000 of Fund assets.

On January 12, 1989, Benjamin received a three-year prison sentence for embezzling over \$500,000 and was ordered to make restitution in the amount of \$320,000. Brown received a three-year suspended sentence, five years probation and fined \$7,500. Panullo received a suspended sentence, five years probation, ordered to make restitution, and fined \$1,000.

14. Jerry Traver

Jerry Traver, owner of Traver Management and Trust company was indicted January 18, 1989, by a federal grand jury for embezzling over \$150,000 from an employee pension plan.

15. Ruben Willis O'Neal, Jr.

Ruben Willis O'Neal, Jr., a trustee of the Apprenticeship Fund of Ironworkers Local 493 of Nashville, Tennessee, was indicted on three counts of embezzlement from an ERISA covered plan.

The indictment was handed down by a federal grand jury on January 18, 1989, charging O'Neal with embezzlement, stealing and converting over \$30,000 in assets of the Fund for his own use. O'Neal, however, has not been located.

16. Bobby Goodwin

Bobby Goodwin, member of Operating Engineers Local 513 in St. Louis, Mo., pled guilty to one count of mail fraud in a scheme to defraud the local's fringe benefit fund and Blue Cross/Blue Shield of over \$20,000.

On January 20, 1989, Goodwin received a three year sentence, was ordered to serve 90 days in jail, with the remainder of the sentence suspended, fined \$1,000 and ordered to make restitution to the Plan and Blue Cross/Blue Shield of Missouri in the amount of \$3,416.58 and \$33,495.06 respectively.

17. Drozdz, Falcone

Linda A. Drozd of Kansas City and Lisa A. Falcone of Phoenix, Arizona pled guilty to conspiracy to embezzle \$24,621 from the carpenters District Council of Kansas city and Vicinity Welfare Plan.

On March 30, 1989, both Drozd and Falcone received a suspended sentence and were placed on probation for a period of five years. In addition, they were ordered to make restitution of \$24,621 to the Plan.

18. Trainer, Rittman

James E. Trainer III and David K. Rittman, Iowa employee benefit plan administrators, were indicted on 10 counts of embezzling over \$247,000 and on one count of conspiring to embezzle from welfare benefit plans to which they provided third party administrative services.

On April 20, 1989, Trainer and Rittman were sentenced to serve two years in prison, five years of probation and ordered to make restitution in the amount of \$247,970 and pay a special assessment of \$550 each to the victim protection fund.

19. Star Metzger

After waiving indictment, an information was filed on April 28, 1989, alleging Metzger, a former plan administrator to the Iron Workers Shopman's Local 468 Insurance Trust Fund in Cleveland, Ohio, embezzled plan funds. Sentencing took place on the same day and Metzger received two years of probation for embezzling \$15,579 from the employee benefit plan.

20. Sherman E. Armstrong

On May 9, 1989, Sherman E. Armstrong, plan trustee and owner of the defunct Armstrong Mould, Inc., was indicted on five counts of embezzlement of approximately \$650,000 from an ERISA covered plan, two counts of falsifying records and two counts of mail fraud to conceal the embezzlement of pension assets.

Armstrong was sentenced to three years in prison, placed on five years probation and fined \$20,000 for the embezzlement of \$200,000 in pension assets and falsifying plan records.

21. Dena Gautreaux

On May 25, 1989, Dena Gautreaux, former plan administrator of the Lafayette Area Electrical Workers Welfare Fund, pled guilty to one count of embezzling \$40,000.

Gautreaux received a two year suspended sentence and two years unsupervised probation and was ordered to make restitution by July, 1989 for embezzlement of \$40,000 in employee benefit assets.

22. Thomas D. Lundberg, et al

On March 17, 1989, a New Mexico grand jury indicted Lundberg, the president of Lundberg Industries, Sanders, a Dallas attorney, Donaldson, a Dallas insurance agent, Longo, a Dallas financial consultant, and Boatwright, the Plans' actuary and consultant, on mail fraud, embezzlement and conspiracy to embezzle more than \$9,000,000 from the pension fund.

Donaldson and Longo entered a guilty plea to reduced charges of aiding and abetting (18 USC 2). Boatwright entered a guilty plea to a reduced charge of conspiracy: failure to report a prohibited transaction. On March 13, 1990, Donaldson, Longo and Boatwright were each sentenced to 5 years probation and ordered to pay \$25.00 in court costs.

On March 14, 1990, Wall also pled guilty to violations of conspiracy and filing false ERISA reports and was sentenced to 3 years probation and 100 hours of community service.

Both Lundberg and Sanders were convicted on February 13, 1990 of conspiracy and embezzlement. In March, Lundberg was sentenced to three years in prison and five years probation. Sanders received three years in prison, five years probation and surrendered his license to practice law.

23. Jack W. Nickelson

On October 18, 1988, a federal grand jury indicted Nickelson on 10 counts of embezzling \$485,000. Nickelson withdrew approximately \$238,000 in excess of his accrued benefit in the Southwestern Rubber & Packing company employees Profit Sharing Plan and Trust.

Nickelson pled guilty to one count of embezzlement. On December 11, 1989, Nickelson was sentenced to 5 years probation and ordered to pay restitution in the amount of \$280,000.

24. Pension Plan of Mountain State Steel Foundries

On July 26, 1988, George E. (Bunker) White III was indicted on seven counts of embezzling over \$1.3 million from the pension plans of Mountain State Steel Foundries Inc. and on tax evasion, falsifying tax returns and other criminal activities. On January 4, 1989, White was sentenced to 8 years in jail and fined \$50,000.

Senator METZENBAUM. In what percentage of the cases does the Department restore all losses and all the profits to a plan? Do you understand the question?

Mr. BALL. You are asking whether 100 percent of the losses to the plan are recovered in every case. We do not keep records of that kind so it is difficult for me to answer you. I would suspect in most cases it is somewhat less than 100 percent. However, in the last five years the Department has been able to restore \$480 million to plans as result of its enforcement activity.

Senator METZENBAUM. What is the Department's average percentage recovery to plans where the PBGC has been liable to come up with the money?

Mr. BALL. I have with me, Mr. Chairman, my deputy, Alan Lebowitz, Deputy Assistant Secretary for program operations, and he has the answer to that question.

Senator METZENBAUM. We are happy to have you with us.

Please proceed.

Mr. LEBOWITZ. Thank you.

In those circumstances where PBGC may have to take over the plan—is that your question, Mr. Chairman—

Senator METZENBAUM. Yes, yes.

Mr. LEBOWITZ [continuing.] Offhand, I really don't know, but we would certainly be able to determine whether we have been involved in those cases.

Senator METZENBAUM. Would you guess it is in the area of 5 percent, 50 percent, or 95 percent?

Mr. LEBOWITZ. I would think it would be a very small number of cases. In Mr. Ball's testimony he indicated that most of PBGC's obligations arise from underfunding rather than fiduciary abuse. The number of circumstances in which a fiduciary issue would have been referred to us by the PBGC would be quite small, in addition to the fact that there may be no entities available to seek recovery from. But we will certainly determine whether any of those cases have been referred to us for action.

Senator METZENBAUM. Well, will you provide this committee with the amount paid out in 1989—or if it is too early for 1989, perhaps take the last five years—the amount paid out and the average percentage recovery to the plans, and also be good enough to indicate whether or not in each of those situations there was a fiduciary violation, and if there was a fiduciary violation, what action, if any, was the fiduciary required to make, or was he or she prosecuted.

Mr. Lebowitz. Yes, sir.

Senator METZENBAUM. I think we went into this, but as I understand it the PBGC has \$3.2 billion in assets and \$4.2 billion in liabilities. Last year, how much did the PBGC take in, and how much did they pay out?

Mr. BALL. Senator, as you know, I represent the Pension Welfare Benefits Administration. I do not have with me information with regard to the Pension Benefit Guaranty Corporation. I would be glad to provide that information for the record.

My understanding is that as a result of the higher premiums that this committee under your leadership generated for the PBGC, the PBGC actually had a better year last year than it has in many

previous years, and that the premiums are improving the position of the PBGC.

But I would have to defer to them to obtain the exact information.

Senator METZENBAUM. All right. Their annual report seems to indicate that they about broke even. That is very frightening in view of the fact that the economy is pretty strong, and if they are only breaking even when the economy is strong, Lord help us when the economy gets weaker, and greater demands would then be made upon those plans.

Now, with respect to the pension and welfare benefits program, can you tell me what the financial status of that matter is?

Mr. BALL. Well, we have an annual budget, Senator, of around \$50 million. We have asked for an increase in that budget to provide additional enforcement staff to pursue many of these matters we have been discussing.

Senator METZENBAUM. ERISA has always given the Department the power to issue penalties for prohibited transactions by welfare plans. Has the Department ever issued a penalty for a prohibited transaction in a welfare plan?

Mr. BALL. I believe you are referring to section 502(i).

Senator METZENBAUM. That's correct.

Mr. BALL. I believe the Department has not ever issued a penalty. I believe there are a couple of matters under consideration now, but I'd like my deputy to add to that information.

Mr. LEBOWITZ. That is correct, Senator. Up until now, we have not actually assessed a penalty. There are several cases under consideration now and a couple where we have recommended to the Solicitor that penalties be imposed, and the Solicitor's Office is considering those now.

Senator METZENBAUM. For 15 years you have had the right to impose penalties and never imposed one; is that correct?

Mr. LEBOWITZ. That's correct.

Senator METZENBAUM. That's correct.

For the past 2 years, the Department has had the power to issue penalties against employers who fail to file ERISA annual reports. Has the Department ever issued a penalty for failure to file an ERISA report?

Mr. LEBOWITZ. Mr. Chairman, the penalties with respect to reporting violations were made applicable to annual reports beginning with the 1988 plan year. Those forms under ERISA were not required to be filed until mid- to late 1989. There is a 210-day period that plan administrators have before they are required to file, and then extensions can be granted, and are granted routinely by the Internal Revenue Service when requests are made. So the penalty provisions are only now applicable.

As Mr. Ball described, our new data system is designed to screen out those forms that are incomplete or inconsistent. We have a rather sophisticated system of about 135 separate, automated edits. When a form is identified as being deficient, we communicate with the filer to try to achieve correction, and once the cycle of correspondence is completed, we will be assessing penalties.

We are now getting to the point where that cycle has been completed for a number of filers and we will be going through the next

set of procedural steps that the law and our implementing regulations require before the penalty can be imposed.

But the system is in place, and the process of reviewing the forms and identifying deficient filings is certainly operating.

Senator METZENBAUM. Well, the 1988 forms now are about six months past the filing deadline. There have been extensions. My question is will there be penalties assessed.

Mr. LEBOWITZ. Yes, sir.

Senator METZENBAUM. When do you think the first of those will occur?

Mr. LEBOWITZ. I would think that just given the nature of the administrative process, probably the first formal assessment of penalties will be sometime this summer. The administrative proceedings that will lead to the imposition of those penalties are beginning now, but the time frames built into the law and built into the administrative adjudicatory process will take some time to work its way through. So the penalties themselves will be assessed in the summer.

Senator METZENBAUM. We will be watching that.

Mr. BALL, is there any special training given with respect to the Department's criminal investigative efforts, and could you describe in detail how the Department trains its investigators to detect ERISA violations?

Mr. BALL. Yes, Mr. Chairman, we do have an extensive training program. It is probably of particular interest to you that the training includes training in detecting possible criminal violations of ERISA. We send our investigators to a Federal program, a white collar crime training program, and they participate in that program.

We have also just developed our own criminal training program, and that is going on right now. We have an extensive training program.

Senator METZENBAUM. And what, would you say, are the most common targeted abuses that you find in your work?

Mr. BALL. The most common targeted abuses?

Senator METZENBAUM. Which abuses seem to appear most regularly where you believe that your investigators can bring about some reforms?

Mr. BALL. Where investigators can—

Senator METZENBAUM. Can bring about either some prosecutions—I said reforms—prosecutions, or at least see to it that the penalties that would be assessed would cause the problem not to recur. In other words, what are you finding as being the most general kind of abuses when the investigators are out there?

Mr. BALL. Probably one of the most common abuses we find is where a business starts to get into financial difficulty of some kind, the temptation is to invade the pension plan and either take money from the pension plan without the security of a loan or do it with an improper loan of some kind.

Senator METZENBAUM. A lot of people who are familiar with this area seem to feel that the small plans are more likely to misuse plan assets than the larger plans, yet the Department focuses primarily on large plans, and as a matter of fact, the small plans are only required to report to the Department once every three years.

First, do you think it is sufficient that they report only once every three years, and do you believe that there is a sufficient amount of auditing of those small plans being done by the Department?

Mr. BALL. Senator, the chart that I had on the wall here indicated that our significant issues strategy touched 78,000 plans in 1989. Most of those were large plans.

However, part of that enforcement strategy is to go after service providers. Fifty percent of the resources of our field offices are assigned either to looking at financial institutions or service providers. The service provider strategy is designed with the notion that one service provider might service many plans. By going after the service provider, if we find a problem in one particular case, we are likely to find that the same service provider might have misperformed in another case.

Our experience has been that somewhere between 20 to 30 percent of the cases touched by that significant issue strategy affect small plans. So we do go after small plans.

Senator METZENBAUM. The Inspector General found that 65 percent of the reports that they checked did not provide all of the information required under ERISA. That is a very large number. Does the Department agree with that finding? That is my first question.

Mr. BALL. I question whether the sample that the Inspector General used was a statistically valid sample. It may have been a sample where the cases were identified as misperformers in some way. However, as far as deficiencies in the Form 5500, we are addressing that problem through our new information system and the automated correspondence which is designed to correct deficiencies. Our experience has been that there are a large number of deficiencies—the chart shows as many as 360,000 plans in the United States received correspondence from us with regard to deficiencies—but also that 90 percent of those deficiencies are corrected within a very short order the first time around.

Senator METZENBAUM. Referring back to the Inspector General, I guess I have to ask you what good is an automated review of an annual report that the Inspector General says is almost worthless, and the accounting profession says they won't help to improve?

Mr. BALL. Senator, I think there are really two different issues. If the Inspector General said the automated review of pension plans is worthless, then I would just have to disagree with him.

However, I think the bulk of his remarks were directed to something quite different, and that was the audits by the independent public accountants. As I mentioned to you earlier when you asked me a question, I think the Inspector General has performed a service in this area. He has identified ways that the auditing process can be improved—for example, the elimination of the limited scope audit, the strengthening of compliance testing, peer review. These are areas where we have been working with the Inspector General, and we believe the auditing process should be improved. And the Secretary will be making recommendations in this area.

Senator METZENBAUM. You know that the Inspector General indicated his unhappiness with the fact that the accounting profession is not willing to do the necessary accounting that he feels

should be done. Do you agree with the Inspector General in that respect?

Mr. BALL. Absolutely, Senator. I am glad you asked me the question. The views that he expressed, we share.

Senator METZENBAUM. Do you have any problem when I make a telephone call to——

Mr. BALL. I'd be delighted to write a supporting letter.

Senator METZENBAUM. Thank you very much.

Thank you very much, Mr. Ball. I said at the beginning of this hearing that I think you are a decent man. I think you want to do the job right. You asked me about sitting down and talking about what could be done further; I will be happy to do that with you.

I think there is much that can be done, and I am looking forward to working with you to see that we achieve our mutually agreed upon objective.

Mr. BALL. Senator, it has been a great honor to testify, and it will be an honor to work with you in enforcing ERISA.

Thanks for having me here.

Senator METZENBAUM. Thank you very much.

Our last three witnesses are: Mr. Tas Coroneos of Washington, DC; Mr. David Preminger of Rosen, Szegda, Preminger & Bloom of New York; and Ms. Karen Ferguson, Executive Director of the Pension Rights Center of Washington, DC

I told you that there is a press conference in this room at 10:30, so I am going to have to confine you very strictly to the 5-minute rule. You are all familiar with the Washington scene and will probably have no difficulty at all in doing that.

Mr. Coroneos, we have your name first on the list. I don't know why, but since you are the first listed, why don't you proceed, sir?

STATEMENTS OF TAS CORONEOS, WASHINGTON, DC; DAVID S. PREMINGER, ROSEN, SZEGDA, PREMINGER AND BLOOM, NEW YORK, NY; AND KAREN W. FERGUSON, EXECUTIVE DIRECTOR, PENSION RIGHTS CENTER, WASHINGTON, DC

Mr. CORONEOS. Thank you, Mr. Chairman.

I am a very frustrated involuntarily retired retiree who will be age 70 in August.

My career with Metropolitan Life began in January of 1948. It was a most enjoyable and rewarding one in sales management—that is, until September 1977, when Metropolitan Life ordered me to vacate my office over the weekend and administratively put me on disability status. They did this although the results of my annual medical checkup in August established that I was very healthy.

Unbeknown to thousands of us older Metropolitan employees past the early retirement age of 55, Metropolitan's chief executive officer requested that the board of directors formalize a secret involuntary retirement program which included separation pay allowances.

Metropolitan did not disseminate any of the information to us plan participants about this employee welfare benefit plan. Only the heads of departments were made aware of the separation pay allowance program and the involuntary retirement program.

Indeed, Metropolitan did not inform the Internal Revenue Service on the EBS forms nor on the Forms 5500 submitted for the plan years 1976 through 1982 of the existence of the separation pay allowance plan. Frankly, sir, I think that is a criminal violation, and there are a lot of them in here.

Metropolitan still refuses to allow me to review the plan documents for this separation pay allowance program. Four months after Metropolitan summarily declared me to be disabled, in mid-January 1978, the company's medical director instructed the home office to stop any form of payment to me. There has been no change in my medical condition at that time nor at any time between September 1977 and January 1978.

Metropolitan to this very day has refused to inform me what my status was for the time period between January 1978 and December of 1979. This status issue was and still is a very crucial matter of law for my purposes, Senator.

Metropolitan still owes me more than \$50,000 of pension benefits for the period of time between January 1978 and December 1979.

For a number of reasons, I attended law school and graduated in October 1983. I passed the DC Bar Examination in February 1984. Subsequently I took all of the ERISA courses offered at the Georgetown University Law Center. I think it is an unconscionable burden to make a plan participant have to become a lawyer at the age of 63.

My struggles with Metropolitan started in 1977 and have continued through the past 12 years. In addition to two separate and distinct lawsuits against Metropolitan, I have continuously endeavored to reconcile our differences through less burdensome alternatives.

My efforts to exhaust my administrative remedies have been in vain, mainly due to Metropolitan's stonewalling and being nonresponsive to my requests for information or disclosure.

For the past few months, there has been a clanging silence, probably due to a number of my requests for Metropolitan to reconcile conflicting statements its representatives have filed in Federal courts and even to you, sir, in your hearings here, not at this particular committee, the chief executive officer.

My efforts to have the Department of Labor assist me in obtaining my "ERISA-protected rights and benefits" have been a shocking and frustrating experience. The many Department of Labor pamphlets and many other publications consistently extol how well-protected are participants' rights and entitlements. However, who is to do the protecting in these instances which reveal that no one is responding? Frankly, I am wondering if they are on duty.

The Technical Assistance Unit in the Department of Labor has all the badges of a loser. They have one excuse after another—truly the trademark of a loser-type—as to why they cannot render assistance, such as budgetary restraints, insufficient number of employees, and they cannot consider assisting me unless there are many more with similar problems or requests.

The New York City Investigative Unit of the Department of Labor asked me to come to New York for a consultation with them. Wow—at long last, there was going to be action. I had been under the erroneous impression that the Department of Labor would re-

imburse me for the expenses to travel to and stay in New York City. Shocking and sobering—yes—but everything is relative.

For the very first time in my life, I realized how the rape victims must feel. They made me feel as though I had to prove I did not want to be raped by Metropolitan and its plan administrators.

The summary plan descriptions and the Department of Labor publications on claim procedures unambiguously State that participants should consult with their friendly and compassionate plan administrator who has just involuntarily terminated them, or to seek assistance from the nearest labor management office of the Department of Labor.

In the unlikely event that the participant's concerns have not been satisfied after all that, the publications inform him to make a Federal case out of it, even if his claim were very small—

Senator METZENBAUM. Mr. Coroneos, I am limited in time, so if you would please state your last sentence.

Mr. CORONEOS. All right—because of diversity of citizenship, they have to do it.

Frankly, I don't look forward to a minimum of three years of litigation and tens of thousands of dollars of legal expenses.

Could I tell you of just two experiences, Senator? One woman right now, whose income will drop from \$12,000 to \$6,000 unless she sues, and the attorney—not me—wants \$20,000 to \$30,000. Another case of a retired person in a class action case I as involved in, when they raised the deductible from \$100 to \$424, she couldn't afford to have her second leg amputated.

Thank you, sir, for this opportunity to testify.

Senator METZENBAUM. Thank you very much, Mr. Coroneos.

We will try to see if we can't get from Metropolitan a copy of that original plan. I think you are entitled to it; I think the Department of Labor should have helped you, and if they cannot, maybe we can.

Mr. CORONEOS. Thank you, sir.

[The prepared statement of Mr. Coroneos follows:]

LAW OFFICES
TAS CORONEOS

C/O IRVING R. M. PANZER, ESQUIRE

1814 N STREET, N.W.

WASHINGTON, D.C. 20036

656-1124

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My struggles with Metropolitan started in September 1977 and have continued through the past twelve years. In addition to the two separate and distinct law suits against Metropolitan, I have continuously endeavored to reconcile our differences through less burdensome alternatives.

My efforts to exhaust my administrative remedies have been in vain, mainly due to Metropolitan's stonewalling and being non-responsive to my requests for information or disclosure.

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My efforts to have the Department of Labor (DoL) assist me in obtaining my "ERISA protected rights and benefits" have been a shocking and frustrating experience.

The many DoL pamphlets and many other publications consistently extol how well protected are participants' rights and entitlements. However, who is to do the protecting in these instances which reveal that no one is responding?

The Technical Assistant Unit in the DoL has all the badges of losers. They have one excuse after another excuse (trademark of the loser-type) as to why they can not render assistance, such as: budget restraints, insufficient number of employees, and they cannot consider assisting me unless there are many more with similar problems and requests.

The NYC Investigation Unit of the DoL asked me to come to NY for a consultation with them. Wow, at long last there was action!

I had been under the erroneous impression that the DoL would reimburse me for the expenses to travel to and stay in NYC. Shocking and sobering? Yes, but everything is relative.

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The Summary Plan Descriptions and DoL publication on claim procedures unambiguously state that participants should consult with their friendly and compassionate Plan Administrator who has involuntarily terminated them or seek assistance from the nearest Labor/Management office of the DoL.

In the unlikely event the participant's concerns have not been satisfied after that, the publications inform him to make a federal case out of it, even if his claim were small, as the Plan Sponsor would plead that diversity of citizenship requires federal courts which have no small claims courts.

The participant such as I can look forward to a minimum of three years of litigation and tens of thousands of dollars of legal expenses. I have been and continue to be most fortunate in having had the economic resources necessary to confront Metropolitan.

However, not every Metropolitan participant has the economic and/or other resources to confront Met Life. For example, just this past January an involuntarily retired Metropolitan participant who had been stonewalled by Met's Plan Administrator was informed by her attorney that her only recourse in pursuing her claim to be restored to disability status and to receive approximately \$12,000 a year income, rather than to be pensioned for half that amount was to sue. Her projected legal costs? Twenty to thirty thousand dollars!

Frustration! This pathetic participant is truly devastated. She feels so violated By Metropolitan's Plan Administrator.

Another example: Metropolitan increased the deductible amount for annual medical expenses to the retirees from \$100 to \$424 despite Metropolitan's promise to provide retirees with lifetime medical benefits at no cost to the retirees.

It is my understanding that because of this \$324 increase deductible cost a female retiree could not afford to have her second leg amputated.

The contrast of the tens-of-billions of dollars the Metropolitan Plan Administrator has at his disposal to defend a legal action with the resources of the average retiree and/or plan participant is staggering!

Again and most sincerely Mr.Chairman, my thanks for this opportunity to be heard for myself and on behalf of so many others in a similar predicament.

ADDENDA

The chart below illustrates vividly the dramatic increase in the number of Metropolitan Plan Participants classified as disabled as reported on Forms 5500.

Chart of the number of pension participants terminated who were classified as disabled with deferred benefits

<u>PLAN YEAR</u>	<u>No. DISABLED</u>
1977	260
1978	562
1979	627
1980	1,531
1981	1,526
1982	2,082
1983	1,974

Senator METZENBAUM. Mr. David Preminger, we are happy to have you with us, sir.

Mr. PREMINGER. Thank you, Mr. Chairman.

I appreciate the invitation to testify this morning.

I have been litigating pension cases on behalf of participants since 1972, and the subject of participants' rights and the enforcement of them is one which I deem very important.

Previous witnesses today have testified concerning Department of Labor enforcement of participants' rights. It has been my experience that the Department's involvement in this area has been fairly severely limited. Frequently, participants have come to see me only after consulting with the Department of Labor regional office. Often they have been advised that the Department cannot be of assistance. On some occasions the Department has written to the plan in question and received either no response or an inadequate one, and in these cases the Department has simply advised the participants that there is nothing further it can do and private counsel should be consulted.

I am aware that the Department has been involved in many lawsuits with respect to a variety of issues regarding ERISA. In fact, I am currently involved in a case which has been consolidated with a Department of Labor case.

But the cases in which the Department has been involved in are principally major impact cases. They are not routine enforcement of participants' rights. They are not the day-to-day claims, which are the majority of the issues which participants have to raise.

And perhaps because the Department can deal with the many cases which come up concerning the enforcement of participants' rights, Congress in passing ERISA anticipated or hoped that the private bar would play a significant role in enforcing its provisions.

Unfortunately, various court rulings have so limited attorneys' fee awards and other potential recovery that private attorneys are reluctant to take the time to learn ERISA and litigate cases which may not be sufficiently lucrative.

The vast majority of plans are not of sufficient size to draw anyone's attention other than the employees involved. Because of this, small, single-employer plans provide the greatest opportunity for abuse. For example, small plans will frequently not cover eligible employees simply to avoid paying benefits. But because the Supreme Court has ruled that punitive and extracontractual damages are not available under ERISA, a fiduciary who transgresses its provisions is never going to be required to pay a participant more than the actual benefit owed. The fiduciary himself is not going to be required to pay it; the plan will.

In smaller plans where the employer is usually the fiduciary, this risk may be significantly outweighed by the possibility that the employees will never even learn of their rights and that no benefit will ever have to be paid. So that the possibility of the imposition of punitive and extracontractual damages should assist in ensuring compliance with ERISA's provisions.

Attorneys' fees are another problem. Not only are they discretionary, but courts apply very strict standards in determining whether to award fees. Because very few participants can afford to finance litigation, they must rely on counsel who are willing to

accept these cases on a contingency basis. The difficulty in obtaining a fee award hardly serves as an incentive for counsel to do so.

In addition, a court ruling which holds that defendants may request a waiver of attorneys' fees as part of a settlement makes matters worse. If the most a defendant can be required to pay is the actual benefit owed, an offer to settle for full benefits conditioned on a waiver of attorneys' fees amounts for all intents and purposes to an admission of liability with no consequences.

While the client would be hardpressed to turn down such an offer, the attorney would in all likelihood end up not being paid.

Also since the passage of ERISA, plans have become much more adept at initially denying benefits, but if pressed, granting them during the course of the plan's claims procedures, especially if the participant is represented at that stage by counsel.

Again, courts have often held that one must exhaust these claims procedures as a prerequisite to commencing litigation. Other case law suggests that a claim resolved at this stage will not support an independent proceeding for attorneys' fees. If a participant is successful at the claims level, he receives his benefits, but again is without the resources to pay the attorney who obtained the relief. So again you have a system which contains a disincentive to participation by the private bar.

Another continual problem since the passage of ERISA has been the refusal of plans to provide documents to participants despite ERISA's requirements that they do so. This frequently necessitates commencing an action, again requiring counsel to compel production. Congress was so concerned that participants be fully informed that it included a section authorizing courts to impose a penalty for failure to provide documents. But courts have consistently refused to impose a penalty absent a showing of prejudice—apparently, having to file a lawsuit to get documents you are entitled to is not sufficient prejudice.

Mr. Maria testified earlier today that the reporting and disclosure to employees was crucial because employees were to provide the first line of defense. If they can't get the documents, there is no possibility of a defense.

If Congress' opinion is that private enforcement of ERISA is important, then ERISA is going to have to be amended to make these cases more attractive to the private bar. Possible amendments are mandatory attorneys' fees for a prevailing plaintiff; the possibility of extracontractual and punitive damages; Federal jurisdictions for actions for attorneys' fees by participants who prevail during claims procedures; prohibiting defendants from conditioning settlement on either a waiver or a limitation of attorneys' fees; and imposing a mandatory penalty for failure to provide documents.

In summary, I don't believe that participants can adequately protect their ERISA rights without the assistance of counsel. Because of the complexity of the ERISA and the cases it spawns, the private bar will not and often cannot afford to become involved because of the existing problems regarding compensation. If these problems as I have outlined them were resolved, I believe that not only would more attorneys prosecute these cases, but the potential risk for plans, fiduciaries and plan sponsors for violating ERISA would ensure far more effective self-regulation.

Thank you.

Senator METZENBAUM. Thank you very much, Mr. Preminger, also for the good timing of your statement in taking five minutes. [The prepared statement of Mr. Preminger follows:]

STATEMENT OF DAVID S. PREMINGER
TO THE SUBCOMMITTEE ON LABOR OF THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
MARCH 6, 1990
WASHINGTON, D.C.

Mr. Chairman and Members of the Subcommittee, I am David S. Preminger, a partner in the New York law firm of Rosen, Szegda, Preminger & Bloom. I have been litigating pension cases on behalf of participants since 1972, both as a legal services attorney and, since 1980, in private practice. I thank you for the invitation to testify today about ERISA enforcement.

ERISA contemplates enforcement of its provisions both by the Department of Labor ("DOL") and by participants in their own right.¹

DOL

With respect to the DOL, it has been my experience that their involvement in this area is severely limited. Frequently participants have come to me only after consulting with a DOL regional office. Often the participants have been advised that DOL cannot be of assistance. On occasion, DOL has written to the plan in question and received either no response or an inadequate one. In these cases, DOL has advised the participants that there is nothing further it can do and private counsel should be consulted.²

¹ When I speak of enforcement, I am referring to enforcement of participants' rights rather than any responsibility for audits or other review which DOL may have.

² I presume that DOL simply has insufficient resources to provide meaningful assistance in these cases.

On the other hand, the DOL has been involved in many lawsuits with respect to a variety of issues regarding ERISA. My firm is currently co-counsel for a class of plaintiffs in a major lawsuit in the Southern District of New York which has been consolidated with an action brought by the DOL.³ The work of the DOL lawyers in this litigation⁴ has been prodigious both as to quantity and quality.

Private Enforcement

Congress, in passing ERISA, anticipated the private bar would play a significant role in enforcing its provisions. The inclusion of section 502(g) permitting an award of attorney's fees was in furtherance of this goal. However, various court rulings have so limited fee awards and other potential recovery that private attorneys are reluctant to take the time to learn ERISA and litigate cases which are not sufficiently lucrative.

(a) Punitive and Extra Contractual Damages

The vast majority of plans are not of sufficient size to draw the attention of anyone (including the DOL) other than the employees involved. Because of this, these small single employer plans provide the greatest opportunity for abuse; e.g., the impermissible exclusion of employees from coverage.

Because the Supreme Court has ruled that punitive and

³ In re Masters, Matas & Pilots Pension Plan and IRAP Litigation, Lead Docket No. 85 Civ. 9545 (VLB).

⁴ Currently Jeff Sacher, Esq. and Suzanne Windle, Esq.

extracontractual damages are not available under ERISA,⁵ a fiduciary will never be required to pay a participant more than the benefit owed (which will be paid by the plan). In smaller plans where the employer usually is the fiduciary, this risk is significantly outweighed by the possibility that the employees will never learn of their rights and no benefit will ever be paid.

The possibility of the imposition of punitive and extracontractual damages should, therefore, assist in insuring compliance with ERISA's provisions.

(b) Attorney's Fees

Not only are attorney's fees discretionary, but courts apply strict standards in determining whether to award fees. Because very few participants can afford to finance litigation, participants must rely on counsel who are willing to accept these cases on a contingency fee basis. The difficulty in obtaining a fee award hardly serves as an incentive to do so.

In addition, a court ruling which holds that defendants may request a waiver of attorney's fees as part of a settlement⁶ unjustifiably impinges on the prosecution of these cases. If the

⁵ Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985).

⁶ Evans v. Jeff D., 475 U.S. 717 (1986).

The Association of the Bar of the City of New York had, prior to Jeff D., taken the position that conditioning settlement on a waiver of attorney's fees was unethical. After Jeff D., the Association reversed that opinion. Opinion 1987-4, Committee on Professional Responsibility.

most that the defendant can be required to pay is the actual benefit owed, an offer to settle for full benefits conditioned on a waiver of attorney's fees amounts, for all intents and purposes, to an admission of liability with no consequences. While the client would be hard pressed to turn down such an offer, the attorney would, in all likelihood, not be paid; the client could not afford to pay and the pension benefit cannot be attached.

Finally, since the passage of ERISA, plans have become much more adept at initially denying benefits but, if pressed, granting them during the course of the plan's claims procedures, especially if the participant is represented by counsel. However, courts have often held that exhaustion of claims procedures is required before litigation is commenced⁷ and other case law suggests that a claim resolved at this stage will not support an independent proceeding for attorney's fees.⁸ Thus, when a participant is successful at the claims level, he receives his benefits but is frequently without resources to pay the attorney who obtained the relief. Again, the system contains a disincentive to participation by the private bar.

(c) Reporting and Disclosure

It has been a continual problem since the passage of ERISA

⁷ See, e.g., Amato v. Bernard, 618 F.2d 559 (9th Cir. 1980).

⁸ North Carolina Department of Transportation v. Crest Street Community Counsel, Inc., 479 U.S. 6 (1986) (Civil Rights Attorneys Fee Awards Act, 42 U.S.C. §1988). Cf. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) (Title VII, Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k)).

that plans have refused to provide documents to participants despite ERISA's requirements that they do so. This frequently necessitates commencing an action (again requiring counsel) to compel the production.

Congress was so concerned that participants be fully informed that it included section 502(c) authorizing courts to impose a \$100.00 per day penalty for failure to provide documents. Yet courts have consistently refused to impose this penalty absent a showing of prejudice by the participant,⁹ a standard which generally cannot be met. When coupled with the court's reluctance to grant attorney's fees in these cases, plans have every reason to withhold documents until actually in litigation. This was not the result Congress intended.

CONCLUSION

If it is Congress' opinion that private enforcement of ERISA is important, then ERISA must be amended to make these cases more attractive to the private bar. The following are my suggested amendments:

1. Mandatory attorney's fees for a prevailing plaintiff without regard to the amount recovered or the nature of the relief awarded;
2. Extracontractual damages as may be proved and punitive damages in the court's discretion for breaches of fiduciary duty;

⁹ Having to commence the lawsuit in the first place is not, for some reason, considered prejudicial.

3. Federal jurisdiction for actions for attorney's fees by participants who prevail during claims procedures;
4. Prohibiting defendants from conditioning settlement on either a waiver or limitation of attorney's fees; and
5. Imposing a mandatory penalty of \$100.00 per day for failure to provide documents within the time allotted.

In summary, I do not believe that participants can adequately protect their rights without the assistance of counsel. The pro bono bar cannot, to any great degree, offer assistance. Because of the complexity of ERISA and the cases it spawns, the private bar will not and, often, cannot afford to become involved because of the existing problems regarding compensation. If those problems, as outlined above, were resolved, I believe that not only would more attorneys prosecute these cases, but the potential risk for plans, fiduciaries and plan sponsors would insure far more effective self-regulation. I would be pleased to answer any questions which you might have.

Senator METZENBAUM. We are happy to see you again and to have you with us, Ms. Ferguson. Please proceed.

Ms. FERGUSON. Thank you, Mr. Chairman.

I would like first briefly to say that the recommendations that David just made for improving private enforcement of ERISA are much needed, and I hope they will be a subject for study by the subcommittee.

I would also like to mention that Mr. Coroneos' experience is all too common. The Labor Department has no mandate whatsoever to provide information or assistance to individuals seeking to enforce their benefit rights under the law.

We are now in our office doing a study of other worker protection laws, and thus far we have discovered that including statutes administered by the Labor Department, there is no other law where the government agency does nothing for people seeking to enforce their statutory rights.

Now, I am not talking about fiduciary rights. They are addressed by the Labor Department and by my statement and by Mr. Maria's comments.

Mr. Maria has targeted a critically important problem that affects the well-being of millions of individuals. He has pointed out that the Labor Department cannot begin to address the monumental task of overseeing the Nation's 900,000 private pension plans and its 4.5 million welfare plans, but he has not stopped there. He has also pointed to realistic recommendations for solving that problem. I will very briefly discuss some of those recommendations and some suggestions we have for additional reforms.

First let me go over the problem. We have a \$1.7 trillion private pension system, the largest lump of money in the world. It may also be the least effectively regulated lump of money in the world. That is simply because private pension plans operate on an honor system. Congress has prescribed very specific rules of conduct to be followed by plan trustees, but it does not have the resources to enforce those rules. Investigators, as they admit, can audit fewer than one percent of all the plans each year, and the result is, as we have heard, that the retirement security of millions of American workers and retirees is at risk.

There is no question that most pension money is very well-managed. It is invested wisely, carefully, and solely in the interest of the participants and beneficiaries. But there is also no question that hundreds of millions of dollars of pension money have been mismanaged because that money has presented too great a temptation to too many people.

Just reading Labor Department press releases highlights case after case of actions brought against trustees who have used pension plans as their personal piggy banks. The abuses range from highly-sophisticated transactions involving major corporations to situations where small business owners, as we heard from Mr. Ball, have dipped into plans to meet a cash flow crunch, help out a relative, or take advantage of a too-good-to-be-true investment opportunity.

The consequences of pension fund abuse can be devastating to individuals. Roughly one-third of all pension money—an estimated \$600 billion—is in defined contribution plans that are not insured

by the PBGC. The participants in those plans can and do lose some or all of their benefits when their money is mismanaged. I have attached a couple of articles about such individuals.

But even where plans are protected by the PBGC safety net, not all benefits are insured. The Inspector General has recommended a series of proposals that would increase the detection of abuse and would add to the deterrence to abuse.

To begin with, he has recommended that the role of the independent public accountant be expanded. We fully support that recommendation. But we are concerned that his recommendation will not do the job unless two additional measures are also adopted—first, measures that address problems of abuses in small plans, and second, measures that would assure true independence of accountants.

The Acting Inspector General's recommendation that independent public accountants be required to do compliance audits will do nothing to protect participants in the 93 percent of all plans that have fewer than 100 participants. This is because the Labor Department has exercised its authority under ERISA to waive the requirement of an independent public accountant's report for these plans. Small pension plans are particularly vulnerable to abuses resulting from conflicts of interest, since company owners frequently serve as plan fiduciaries. They are also the plans least likely to be insured and least likely to be audited by the Labor Department.

I might point out that the service provider enforcement strategy addresses welfare plans, not pension plans.

We suggest that the subcommittee consider requiring that small plans be subject to a once-every-three-year compliance audit unless all of the plan's assets are invested solely in Federally-insured institutions.

We also believe that measures should be adopted to assure that accountants are truly independent. Under current Labor Department rulings, the Acting Inspector General's recommendation that large plans be subject to compliance audits would have little practical effect because there is a 1975 Labor Department interpretive bulletin that says that the accountant who works for the company the entire year then can do the once a year pension plan audit. That's not independent, but it is permitted by the Labor Department, and we believe that should be remedied.

Finally, the Inspector General has recommended that there be increased deterrence to fund mismanagement. He recognizes that if you simply tell fiduciaries to put the money back in the plan and do it no more, don't serve as fiduciaries anymore, the fiduciary abuse will continue. There must be substantial penalties for mismanagement of plan money.

You, Mr. Chairman, took a very important initiative in this area last year in taking the leadership role in securing the enactment of a 20 percent civil penalty. There is one problem with that penalty because the way it is phrased only works if the investments turn out badly. If the investments turn out well, there is no recovery. It basically states that the 20 percent penalty is to be imposed on the amount "recovered". We would suggest respectfully that perhaps it should say the amount "involved" rather than the amount "recov-

ered" because we do not want plan trustees to be gambling that maybe the investment will turn out correctly.

Very briefly, finally, the recommendations on criminal enforcement are tremendously important. Just listening to the other speakers this morning, I could only conjure up all of the many turf battles we are all familiar with in all organizations, and I genuinely hope that efforts will be made both to possibly strengthen Title XVIII of the Criminal Code and also assure that much greater emphasis is given to the white-collar criminal investigations that you refer to.

Thank you.

[The prepared statement of Ms. Ferguson follows:]

STATEMENT OF
KAREN W. FERGUSON
PENSION RIGHTS CENTER
BEFORE THE
SUBCOMMITTEE ON LABOR
OF THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
U.S. SENATE
MARCH 6, 1990
WASHINGTON, D.C.

Mr. Chairman and Members of the Subcommittee, I am Karen W. Ferguson, Director of the Pension Rights Center. The Center is a public interest group that has been working for the past fourteen years to protect and promote the pension interests of workers and retirees. We thank you for the invitation to testify today on the recommendations of the Acting Inspector General of the Labor Department to improve enforcement of the Employee Retirement Income Security Act of 1974.

The Acting Inspector General of the Labor Department, Raymond Maria, has targeted a critically important problem that affects the economic well-being of millions of individuals: The Labor Department's enforcement efforts are inadequate to properly address the monumental task of overseeing the nation's 900,000 private pension plans and 4.5 million welfare plans. He has also proposed constructive solutions to that problem. Our statement this morning will address the problem identified by the Acting Inspector General and his recommendations for reform. We will also propose additional measures that could help detect and deter fund mismanagement and abuse.

The Problem Targeted by the Acting Inspector General

The \$1.7 trillion in private pension plans has been described as "the largest lump of money in the world." It may also be the least effectively regulated "lump" of money. This is because pension plans operate largely on an honor system. While Congress has prescribed very specific rules of conduct to be followed by plan trustees, the Labor Department does not have the resources to effectively enforce these rules. Its investigators can audit fewer than one percent of all plans each year. The result is that retirement security of millions of American workers and retirees is at risk.

There is no question that most private pension plan money is well managed. It is invested wisely and carefully by plan trustees who take seriously their charge to act "solely in the interest of participants and beneficiaries." But there is also no question that hundreds of millions of dollars of pension plan money have been mismanaged -- the money has presented too great a temptation to too many people.

Labor Department press releases highlight case after case of actions brought against trustees who have used pension plans as their personal piggy banks. The abuses range from highly sophisticated transactions involving major corporations to situations where small business owners have dipped into plans to meet a cash flow crunch, help out a relative, or take advantage of a too-good-to-be-true investment opportunity.

The consequences of pension fund abuse can be devastating to

individuals. Roughly one-third of all pension money -- an estimated \$600 billion -- is in defined contribution plans that are not insured by the federal government's pension insurance program, the Pension Benefit Guaranty Corporation. The participants in these plans can lose all of their benefits when their money is mismanaged.

Even where plans are protected by the PBGC safety net, participants can lose substantial benefits. Most defined benefit plans are insured, but not all benefits provided by those plans are guaranteed.¹ Also, where fund mismanagement results in the early cancellation of a plan, workers may receive a small fraction of the benefits they reasonably expected to receive.²

The Acting Inspector General's Recommendations

To aid in the Labor Department's efforts to detect abuses, the Acting Inspector General has proposed measures that would increase the likelihood that fund mismanagement will be detected. He has also proposed that the Department modify its enforcement strategy to create a greater deterrent to abuse.

¹ Defined benefit plans that are not insured by the PBGC include those with fewer than 25 participants set up by professionals (such as doctors, architects and lawyers); plans related to a religious organization; and plans funded entirely by union dues.

² Many plans are structured so that employees earn disproportionately small benefits early in their employment, with the bulk of their pension in their later years.

Detection of Fund Mismanagement

The Acting Inspector General has proposed that the role of the independent public accountant be expanded. He has recommended that legislation be enacted that would allow the Labor Department to require that independent public accountants:

- o identify violations of law,
- o report those violations to the Labor Department, and
- o be subject to sanctions for inadequate audits.³

If adopted, this recommendation would significantly change the role of accountants who audit pension funds. It would also increase plan costs. However, those added expenses would be a small price to pay for protection of plan assets. The requirement of a compliance audit is a reasonable "trade off" for an employer's right to retain control of plan investments. For many employers, the opportunity to direct plan assets is a sufficient benefit to justify the increased costs. Where it is not, employers should have the option of saving the costs of the audit by relinquishing all control of plan assets to a completely independent trustee.

We fully support the Acting Inspector General's recommendation that pension plan auditors play a significantly expanded role. However, we are concerned that the recommendation

³ The Acting Inspector General has also recommended repeal of the limited scope audit exemption in ERISA Section 103(a)(3)(C). This proposal appears to have wide support and has already been incorporated into proposed legislation by Senators Orrin Hatch and Nancy Kassebaum (S.2012).

will not "do the job" unless measures are also adopted that

- (1) address the problem of abuses in small plans, and
- (2) assure true "independence" of accountants.

Measures must be adopted that will assure the detection of abuses in small plans. The Acting Inspector General's recommendation that independent public accountants be required to do compliance audits, will do nothing to protect participants in the 93% of all plans that have fewer than 100 participants.⁴ This is because the Labor Department has exercised its authority under ERISA Section 103(a)(A) to waive the requirement of an independent public accountant's report for these plans.

Small pension plans are particularly vulnerable to abuses resulting from conflicts of interest since company owners frequently serve as plan fiduciaries. They are also the plans least likely to be insured, and least likely to be audited by the Labor Department.⁵

We urge the Subcommittee to consider amending ERISA Section 103(a)(3)(A) to require that small plans be subject to a once-every-three-year compliance audit unless all of the plan's assets are invested solely in federally insured institutions.

⁴ These plans cover 10% of all participants.

⁵ The Department's enforcement strategy emphasizes investigations of service providers to welfare plans and financial institutions providing services to pension plans. Participants in small plans frequently find it impossible to convince the Department to intercede on their behalf, even where there are clear violations of the law. See articles attached to this statement.

Measures must be adopted to assure that accountants are truly "independent". Under current Labor Department rulings, the Acting Inspector General's recommendation that large plans be subject to compliance audits would have little practical effect. This is because a 1975 Labor Department Interpretive Bulletin provides that accountants can be considered "independent" even if they are retained for other purposes by the company which sponsors the plan and even if they are paid by the plan sponsor to perform the plan audit.⁶

It is simply unrealistic to expect an accountant who has continuing ties with an employer to identify, much less report to the Labor Department, transactions between the plan and the plan sponsor. Since a much larger percentage of the accountant's income will be coming from work performed for the plan sponsor, an accountant reporting a party-in-interest transaction to the Department could reasonably expect to lose both that income and income from future plan audits.

The statutory scheme can operate effectively only if pension auditors are truly independent and only if they understand that their clients are plan participants and beneficiaries, not plan sponsors or fiduciaries.

⁶ The Interpretive Bulletin states that the Department considers an accountant to be "independent" even though the accountant or the accountant's firm "is retained or engaged on professional basis by the plan sponsor." 29 CFR 2509.75-9.

We urge the Subcommittee to consider amending ERISA Section 103(a)(3)(D) to clarify that accountants will not be considered to be independent if they are retained or engaged on a professional basis by the plan sponsor.

Deterrents to Fund Mismanagement

Measures must be adopted that will provide meaningful deterrents to fiduciary misconduct. While an expanded role by accountants will increase the likelihood that abuses in plans will be detected, it will not by itself significantly reduce the incidence of fiduciary misconduct. People tempted to use plan money for their own purposes will continue to engage in unlawful activities even if they know there is an increased risk of being caught -- unless they are convinced that they will be punished for such activities and that the punishment will be substantial.

Civil Enforcement.

Civil penalties. As the Acting Inspector General has pointed out, the Labor Department's enforcement efforts have not provided a deterrent to abuse. This is because, until this year, in most Labor Department-initiated litigation, fiduciaries who had mismanaged plan money were required only to replace the money they had unlawfully taken out of the plan and agree that they would not serve in a fiduciary capacity in the future.

Under the leadership of the Chairman of this Subcommittee, Congress enacted an important new sanction. In any action

brought by the Labor Department, a civil penalty of 20 percent of the amount recovered can be assessed against a plan trustee by a court or in a settlement.

There is, however, a limitation to this provision, namely that there will be no penalty if a trustee's unlawful investment turns out well. If for example, the trustee loans money to himself to pay off personal debts and then repays the money before a lawsuit is filed, there would be no recovery, and, therefore, no penalty.

We urge the Subcommittee to consider amending Section 502 of ERISA to provide that the 20 percent civil penalty be measured by the amount involved in the unlawful transaction, rather than the amount recovered.

Participant litigation. Another important initiative has been announced by the Secretary of Labor, Elizabeth Dole. She has directed the Pension and Welfare Benefits Administration to conduct a study to determine whether ERISA should be amended to eliminate provisions that are now discouraging individual participants from bringing enforcement actions against plans trustees for breaches of fiduciary duty.

The study is addressing two questions: First, whether the Department should propose legislation that would overrule a U.S. Supreme Court case that held that punitive and other extra-contractual damages are unavailable to participants who sue for

fiduciary breaches,⁷ and second, whether it should advocate that attorney's fees should be awarded prevailing plaintiffs in ERISA actions.

Both of these measures are vitally important if participants are to exercise the right to bring private actions for breaches of fiduciary duty. Few lawyers are willing to bring these cases which are very fact intensive and extremely complex. As long as the only monetary remedy is that money be put back into the plan, and as long as attorney's fees remain discretionary, even cases that are "clear winners" will not be brought.⁸

We urge the Subcommittee to consider amending ERISA Section 409(a) to provide that courts be given discretionary authority to award punitive damages in appropriate cases, and ERISA Section 502(g), to create a presumption that attorney's fees are to be awarded to prevailing plaintiffs in litigation brought by participants and beneficiaries.

Bounty Program. The Assistant Secretary of Labor, David George Ball, has stated that the Department is considering instituting a program that would provide a "bounty" to

⁷ Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985)

⁸ There is no danger of frivolous actions burdening the courts if these measures are enacted. Punitive damages are only awarded by courts in particularly egregious cases, and Rule 11 of the Federal Rules of Civil Procedure has proven to be a very effective bar to unjustified litigation. (Also ERISA Section 502(g) provides for discretionary attorney's fees to be awarded to defendants where a court finds a lawsuit to be frivolous.)

individuals providing information to the Department about breaches of fiduciary duty. This is an valuable proposal. Not only are participants are far more likely than a Department auditor to know that a loan made by a plan trustee to a particular company is, in fact, a loan to the trustee's brother-in-law, but plan trustees are less likely to make loans to their brothers-in-law if they know that participants may be monitoring their plans' investments.

The "bounty" could be similar to the Informant's Award that the Internal Revenue Service gives to individuals providing information resulting in the imposition of an excise tax. Just as the IRS award is an amount up to 10 percent of the excise tax collected, the Labor Department award could be up to 10 percent of any civil penalty collected.

If the bounty program were to be effective, however, it would be necessary to provide protection to informants in the form of an assurance that the Labor Department would litigate on their behalf if they were fired or otherwise discriminated against for providing information to the government.⁹ The protections against nondiscrimination would also have to apply to informants who are not plan participants -- for example, a bookkeeper, whose job category is excluded from plan coverage.

⁹ The Labor Department provides this kind of protection to individuals discriminated against because they have notified the Department of OSHA violations. 29 U.S.C. §660(c)

We urge the Subcommittee to consider enacting an Informant's Award program for individuals providing information leading to the imposition of a penalty by the Labor Department, and amending Section 510 of ERISA to require the Department to litigate on behalf of individuals who are fired or otherwise discriminated against for assisting the Department's enforcement efforts.

Disclosure. The principal enforcement tool that Congress provided the Labor Department -- and an important deterrent against abuse -- was the requirement that plans file detailed annual financial reports with the government and make them available to participants.

Over the years, under pressure from the Office of Management and Budget to reach "paperwork reduction goals," the Labor Department has deleted a significant amount of information from the forms. The cutbacks have rendered the forms so unhelpful, that they are now considered to be only "a starting point" for the Department's enforcement efforts. More important, they have left participants without many of the tools they need to watchdog their plans.

Particularly disturbing was the Labor Department's decision last year, to end the requirement that small plans list all party-in-interest transactions and explain the basis for any statutory, regulatory or class exemption claimed for these transactions. Now, there is no listing of any plan investments attached to the form. Nor do participants have the right to

request information about where their money is invested.¹⁰

We urge the Subcommittee to consider amending Section 104 of ERISA to provide that on written request of a participant in a small plan, the Labor Department is to take action to secure from a plan administrator, and provide to the participant, the schedules of investments required by Subsections 104(b)(3)(C), (D), (E), (F) and (H).

Criminal Enforcement.

The Acting Inspector General has rightly pointed out that strengthening civil enforcement of the fiduciary provisions is not enough -- it simply increases the "cost of doing business". When millions of dollars of pension money are "just sitting there," abuses will occur unless the plan trustees are given reason to believe that playing games with other people's money can result in a prison sentence.

Section 664 of Title 18 of the U.S. Code, makes it unlawful for anyone to embezzle, steal, unlawfully and willfully abstract or convert to their own use, or the use of another, any pension assets. The penalties are a fine of up to \$10,000 or imprisonment for not more than five years, or both. This appears to reach self-dealing by plan trustees and most unlawful transactions with parties-in-interest. (It does not apply to

¹⁰ The lack of information provided to participants in small plans is particularly shocking. However, there are also significant omissions in the forms for larger plans.

actions taken by trustees that are imprudent or fail to meet diversification requirements.)

However, it has been twenty years since Section 664 was enacted, and it may be appropriate clarify the scope of the unlawful activities proscribed by the provision, increase significantly the dollar amount of the fine, and specifically provide for mandatory restitution of plan assets and disgorgement of profits. Once these changes are made, the Department and participants can be assured that their rights will not be jeopardized if a decision is made to pursue criminal prosecution.

We urge the Subcommittee to consider amending Section 664 of Title 18 to provide an effective deterrent to willful mismanagement of pension plan money.

In conclusion, I would like to note that our experience has been that workers and retirees have not been alarmed by the Acting Inspector General's reports and statements. Rather, they have been intrigued. Many are now interested in knowing where and how well their money is being invested. They have started reviewing their plans' financial forms and asking questions. Some have brought questionable transactions to the attention of the Labor Department, but most have been reassured by what they have found.

I would be pleased to answer any questions you may have.

he little guy's dreams vanish along with savings

WASHINGTON (AP) — Dot Harkness banked on her pension plan, borrowed money against it and planned to do some traveling with her ailing husband in the Utah hills when she retired. Then she found out the savings she counted on had vanished in a bad investment.

James Carsten worked for a jewelry repair shop for 30 years and figured he'd be due about \$19,000 in pension benefits. Instead, "all the money disappeared," he said.

Mrs. Harkness and Mr. Carsten were victimized by plans that weren't insured by the federal government's Pension Benefits Guaranty Corp. According to government figures, only 40 million of the 76 million workers with private pension plans are eligible for that protection.

By law, pension fund managers are prohibited from putting all the money into a single investment. They also are required to ensure that any risks are reasonable.

But small programs — those with 25 or fewer participants — don't qualify for federal insurance, and even the larger programs can be undermined by bad investments or outright theft.

The "little guys" have an especially hard time making their cases if their funds are abused, according to the Labor Department's acting inspector general, Raymond Maria.

"People are sort of desperate," said Karen Ferguson, director of the Pension Rights Center, a public interest group. "There's no one to help them. If the people who are running the plan are bankrupt, there's nothing to do. And there are a lot of them out there."

The Labor Department's Pension and Welfare Benefits Administration is charged with investigating abuses. But Mrs. Harkness and Mr. Carsten said they received no satisfaction from the government.

Mrs. Harkness, 63, worked as a receptionist for a doctor, handling his billing, setting up appointments and answering the phones. The practice was sold in 1978, but she stayed on and figured her nest egg was safe.

"I was fully vested, so I didn't worry," Mrs. Harkness said in a telephone interview from her Park City, Utah, home.

In 1983, she took out an \$8,500 loan against her pension to buy a 1978 motor home and began paying back \$200 a month, including 14 percent interest, into the account. She figured she had about \$20,000 in the pension fund.

In 1987, she said, she received a

call shortly before midnight from the doctor for whom she was first employed, saying: "We had lost all our money. The account had gone down the tubes."

After failing to get help from the Labor Department, Mrs. Harkness notified the Pension Rights Center, which referred her to an attorney, and the case rests with the courts.

"We were very conservative and raised three children," she said. "I counted on this money."

While Mrs. Harkness sounds distraught, Mr. Carsten is angry.

"I've spent three years trying to get my money, and I've just wasted my time," he said in a telephone interview from his Seattle home.

The company he worked for was sold, and the investment-group administering the plan went bankrupt after reportedly investing in palm trees.

Mr. Carsten went to the Labor Department and wrote letters to his superiors.

But the sheer size of the nation's private pension system works against individuals such as Mr. Carsten and Mrs. Harkness. With just 300 inspectors, the government can check only a tiny percentage of the country's 870,000 such programs. Enforcement actions, by and large, have focused on the bigger offenders.

Mr. Carsten, meanwhile, says he can't afford an attorney to pursue his case on his own. "That's all I have for retirement," he said.

Coping/In Your Prime

By Bard Lindeman

Q. My question is as important to me as it is simple to you: Will I collect my pension? Put another way, is my pension money safe?

A. A federal investigator recently declared, "There is an insidious and steady siphoning off" of pension money across the United States. He added, "I am convinced that there is substantial fraud and abuse, the extent of which no one knows."

But before banging hard on the panic button, let's introduce expert Karen Ferguson, a lawyer who founded and now directs the Pension Rights Center, a non-profit, advocacy group in Washington, D.C. This specialist begins with the constrained opinion: "The situation calls for being alert, not alarmed."

Soft-spoken yet vigilant, Ferguson points out that all U.S. pension plans combined hold \$1.7 trillion. Then, there's another \$1 trillion in health and benefit plans and this vast sum represents to business the greatest pool of "investable capital" in the world. How big is \$2.7 trillion? It matches the gross national product of Japan.

The bad news, according to Ferguson, is that billions of pension dollars, in fact, are unwatched and unprotected. Thus, it's ripe for "investing" or, if you prefer, plundering. See the current scandal on savings and loans institutions for details.

Having made her point, the attorney quickly changed her tone and shifted emphasis. She said next that the majority of assets are honestly, competently cared for by professional managers employed by the Fortune 500 companies.

What can happen if you're not alert, not lucky and don't have a Karen Ferguson in your family? You may wind up alongside Duane Doblar, a hapless victim of pension plunder at age 59, following 33 years on the job. For 23 of those years, Doblar faithfully paid into his company's profit-sharing plan. Now that he's ready to start drawing on his nest-egg, the money is gone!

"I figure I'm owed about \$200,000," he said during a

telephone interview. "I haven't seen a penny — and I don't know if I ever will."

Doblar, who worked for a small, Cleveland-based steel manufacturing company, alleges the owner looted the pension fund. He collected documents in support of his allegation and turned them over to the Department of Labor. His case, he says, is too small, too insignificant and is dwarfed in size by literally hundreds of more flagrant, unconscionable instances of what we euphemistically call "white-collar crime."

Part of the problem, Ferguson says, is that the government's watchdog division is hopelessly outnumbered and outmaneuvered. She states the enforcement section of the Labor Department's Pension Benefits Welfare Administration has about 300 investigators looking over \$90,000 plans. "Even when they do discover mismanagement, they usually just tell the person to put it back," she says, and laughs at the thought.

"In extreme cases, they remove the person as a trustee of the plan," she adds. "Not much of a deterrent."

As for the Pension Rights Center, it continues to lobby Congress for tighter laws, even as it develops a network of lawyers who will take the civil cases of the Duane Doblars. For a list of free publications offered by the center, send a self-addressed, stamped envelope (business size) to this location: Pension Rights, Box Y, 918 16th Street NW, Washington, D.C. 20006. Meantime, Ferguson recommends you get a copy of your company's plan (Form 5500) and be familiar with the bottom line.

Remember, this is your money, and no one cares for it as much as you do.

Bard Lindeman welcomes questions from readers. Although he cannot respond to each one individually, he will answer those of general interest in his column. Write to Lindeman in care of this newspaper, P.O. Box 119, Orlando, Fla. 32802-0119.

Tribune Media Services

Senator METZENBAUM. I thank each of the witnesses. I do have a couple of questions, but I want to say that it is pretty obvious to me that there is a reluctance here in the Congress to provide attorneys' fees because of the sort of horror stories about attorneys getting such great fees when they bring actions, and therefore there is something wrong with the legal profession in doing it.

Here is a very good example of the loss of rights of individuals because the government agency charged with the responsibility is not meeting that responsibility, and there is no provision made to pay for the legal services of lawyers who are willing to take on these cases. This is a matter to which I believe we should address ourselves. There is always this excitement around here about attorneys' fees and what a terrible thing they are, but this is a very good example of the need to make such payments, to make such allowances possible by the courts.

Let me ask you, Mr. Coroneos, do you think the Labor Department was helpful, indifferent, or hurtful to you in your efforts?

Mr. CORONEOS. I would say that, frankly, they were certainly not helpful at all. I would think that up until today, the Inspector General has now put some life into my investigation. I brought about an investigation. I had gone to a law firm to see if they could help me to get the Labor Department to do something. They wanted \$10,000. I decided to invest about \$6,000 in a computer. I learned how to operate it, and I prepared it, and it was on prohibited transactions of about \$50 to \$100 million. They finally agreed to investigate it, but then they called me to New York, and frankly, they didn't want to waste their budget on it, and they wanted to close it down and so on. So I would say until I met Mr. Maria, it was nothing, sir.

Senator METZENBAUM. Did you ever get a copy of the agreement that covers your rights with Metropolitan Life?

Mr. CORONEOS. What particular part, sir? I have right now I would say at least 1,000 different documents. You know, you are supposed to be able to go to the plan administrator and be able to review the plan during business hours. And it is not a bus ride just to go to New York. I have gone up there twice on my own, paid my expenses, and they will not let me see it.

On one occasion when I was involved with a class action, they had two attorneys here to keep me out of the home office. I am quite out of the 60,000 people up there. They know me, sir. But they are stonewalling, and I feel like that little Chinaman in front of that tank.

Senator METZENBAUM. I asked you, though, did you ever get a copy. As part of your testimony I understood you to say you were never able to get a copy—

Mr. CORONEOS. Of that separation paper—in fact, I can show you where they say it is not part of my business; in fact, they have told several other ex-Metropolitan employees the same things. And yet the chief executive officer testified in a deposition that it was for anybody who was involuntarily retired, if they had a reduction in force, RIF, and so forth. Metropolitan admits that they reduced my unit down 20-some thousand people, so we certainly qualify there.

They will build up all kinds of cases that your performance has deteriorated—that is one of the qualifications. They say that if you

have a health condition—that would be mine, even though I am healthy; they said I wasn't.

I think frankly, sir, that is a criminal act to use investments, assets, to pay me disability. Instead of getting it out of Metropolitan, the employer's pocket, they take it out of the plan participants.

Senator METZENBAUM. I must say that I am sort of shocked that the company would not make available the agreement covering you. But what Metropolitan does is not really that shocking to me in another respect, because I will never forget conducting a hearing where Metropolitan was present. They were one of the main witnesses, their chief executive officer. When I asked him who owned the company—it is a mutual company—who runs the company, what rights do the individuals have, the policyholders who are the owners of the company, in no uncertain terms he told me they had no rights. And I asked, well, to whom do the directors have some responsibility, and he said to no one. So it is really this Goliath of a corporation that considers itself above the world, above the law, and totally indifferent to not only concerns of yours, but from previous experience, previous testimony, I have the feeling they are indifferent to their shareholders.

Mr. CORONEOS. Mr. Chairman, could I mention that just this past week, I gave you a thick file in your office about that same subject.

Senator METZENBAUM. Mr. Preminger, you say you handle cases of this kind. Is it only in those cases where a group of individuals are able to retain you and pay you that you get involved, and does it mean that the average individual just is totally precluded from having an opportunity to have legal representation?

Mr. PREMINGER. No. I have represented people who can afford to pay me on an hourly basis, at my usual rates; I have represented people who can afford to pay me something on an ongoing basis, and I have represented people who could not afford to pay me at all, and I have just taken the case either on the assumption that it was a meritorious claim, and ultimately I would recover attorneys' fees, or with the understanding that I just wasn't going to be paid. So it runs the gamut.

Senator METZENBAUM. In the case of Jeff D., what was the court's reasoning in turning down allowance of legal fees?

Mr. PREMINGER. Well, Jeff D. was a civil rights case. The issue has not been specifically addressed in the ERISA context, but the reasoning, it seems, would apply. Basically, in the Jeff D. case, I believe that the plaintiff had sought certain injunctive relief, the government had come in and offered to give the relief which was being sought only on condition that there be a waiver of attorneys' fees. Obviously, given the fact that the relief was being offered—and I believe it was essentially full relief—it is a little hard to turn down the settlement. The question was whether or not that was a legitimate thing for the government to do.

The court simply found that, in those instances where what you are really talking about is injunctive relief, you are not necessarily talking about money damages and it is early on in action—they discussed a lot of factors, but it is not clear that their reasoning was limited to the facts of the case. It was simply that there may be an attorneys' fee statute, and attorneys' fees are obviously an

element of what is ultimately recoverable, and that if the defendant is making an offer of settlement, he can condition it on essentially whatever he wants to. The decision is not quite that broad, but it can be read that way.

Senator METZENBAUM. Ms. Ferguson, as someone who has followed ERISA since its enactment, do you believe the current State of the law with respect to enforcement is what Congress intended in 1974?

Ms. FERGUSON. No, Mr. Chairman. I think it has fallen considerably short. As one speaker noted—I jotted it down, and I'm trying to remember who it was—participants were intended to be the first line of defense against fraud and corruption, and the disclosure of financial status of plans was to be an essential part of the protections, both deterrent and detection. The concept was—and there is wonderful language in the legislative history about the importance of individuals being able to monitor their own plan investments. What has happened over the years is that, under pressure from the Office of Management and Budget to reach paperwork reduction goals, there has been a steady elimination of critical information in the forms that are filed with the government and made available to participants.

The result has been that, with respect to the small plans, there is almost no information there—there is no list of investments. Even last year, there was one listing left. It was a list of party and interest transactions, and the plan administrator were supposed to say which ones were exempt and what was the reason for exemption if they felt they were lawful. That has just been eliminated. And individuals don't even have a right to get the information, so they are left with one question—

Senator METZENBAUM. Individuals have great difficulty finding out what the pension plan is about, what its investments are, what the payouts are, what it takes in, what it spends, what its expenses are. Can an individual normally obtain that information from the pension plan fiduciaries?

Ms. FERGUSON. Only that information which is specifically required by the law and the regulations. And to the extent that there have been cutbacks in what is required, that information is not available to participants.

For example—let me just go back—a list of investments, where your money is invested in a small plan, a matter of great interest to you—you cannot get that information. The Labor Department won't even ask for it for you. The Labor Department claims it has no obligation to ask for forms for individuals, and you couldn't even go to David and hire him to get that information.

Senator METZENBAUM. You cannot find where the pension plan assets—

Ms. FERGUSON. If you are in a small plan, there is no listing of assets, of investments, anymore.

Senator METZENBAUM. But under larger plans, there is?

Ms. FERGUSON. Larger plans, there is. There are problems there, too.

Senator METZENBAUM. That is probably another area to which we should be addressing ourselves.

I want to bring this hearing to a conclusion, but I want to make some definite observations.

I indicated that I would speak with the accounting profession—if I can reach them by telephone, I will do so yet today. I think that there is a degree of irresponsibility in their shirking this obligation. I hope we do not have to pass a law requiring them to accept their auditing responsibility.

I also want to make it clear again that I don't know when I have seen a more dedicated public official than Mr. Maria. And I must confess that it just blows my mind to hear that there is a proposal to remove him and to bring in another official to take his position.

I do not expect to support that position and will take steps in order to see to it that a man who has done his job so well, so zealously, under circumstances that are so difficult, is not removed. I cannot believe the President of the United States knows about it, and I cannot believe that he would want to remove him if he did know about it.

I think that the Inspector General's criminal prosecution authority is an absolute necessity. If we can't get the Labor Department and the Justice Department to reverse themselves, we will move on the legislative route to achieve that objective. It is absurd not to give him, or her, whoever happens to be holding the position, that authority to investigate.

And when all is said and done, the buck stops at the Department of Labor. I believe the Department of Labor is headed up by a very able lady, Mrs. Elizabeth Dole. But this Senator wants to make it clear that I am not satisfied that they are doing all that they can do to protect the working people of this country. Time after time after time, I am told, "There is a study," "We are considering it," "We are looking at it," "We are evaluating it"—and I say to the Department of Labor that this Senator is prepared to work with you and help you in every possible way, but it is time to get off the dime. It is time to give us some action. It is time to move expeditiously in this area.

You don't need to study every problem under the sun for two years, or for one year, or for six months—and in connection with some problems, it is self-evident that changes should be made.

I want the Department of Labor to cooperate with this Labor Subcommittee, but if they do not, we intend to move notwithstanding their actions. To this point, we have had a lot of conversation but very little action. We expect more.

With that, this hearing stands adjourned.

[Whereupon, at 10:40 a.m., the subcommittee was adjourned.]

